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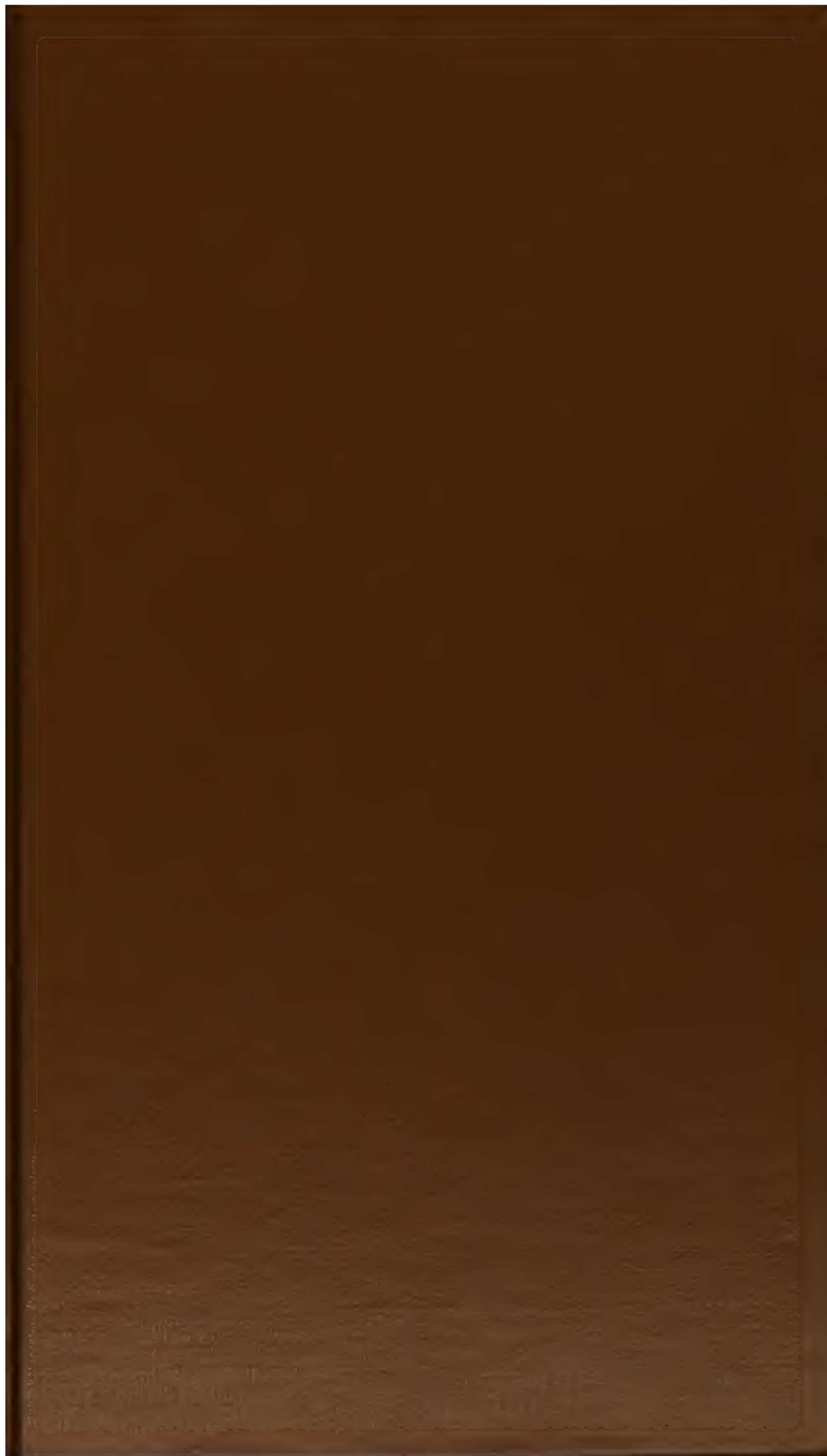
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A TREATISE  
ON THE  
LAW OF EXECUTIONS  
IN CIVIL CASES,  
AND OF  
PROCEEDINGS IN AID AND RESTRAINT THEREOF

BY  
ABRAHAM CLARK FREEMAN,  
AUTHOR OF A TREATISE ON THE LAW OF JUDGMENTS, AND ALSO OF A TREATISE ON THE  
LAW OF COTENANCY AND PARTITION.

*Executio est fructus et finis legis.*

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# LAW OF EXECUTIONS.

VOL. III.



## CHAPTER XXIII.

## REDEMPTION FROM EXECUTION SALES.

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- § 321. The effect of a redemption.
- § 322. Bill in equity to enforce right to redemption.
- § 323. The title of purchaser while defendant has the right of redemption.

§ 314. The Right of Redemption is Statutory Only.—Statutes permitting the redemption of property from execution sales are partly for the benefit of the defendant, and partly for the benefit of persons holding liens against the property acquired from the defendant, but existing in subordination to the execution sale. This right of redemption, no matter in whose behalf or for what purpose invoked, is the creature of the statute. The statute creates the right, prescribes the time and method of its exercise, and designates the persons entitled to exercise it. A person seeking to redeem must, therefore, comply with the statute in every respect. A partial compliance is of no effect. If a redemption has been attempted, the purchaser's rights are not impaired, nor is anything gained by the redemptioner, unless a full compliance with the terms of the statute can be shown.<sup>1</sup> The right is not an equit-

<sup>1</sup> *Aycock v. Adler*, 87 Ala. 190; *Gosmunt v. Gloe*, 55 Neb. 709; *Spoor v. Phillips*, 27 Ala. 193; *Haskell v. Manlove*, 14 Cal. 54; *Chiles*



able right, or, more accurately speaking, is not a right created by courts of equity,<sup>2</sup> and they have, therefore, no power to declare the circumstances upon or the time within which it may be exercised. He who seeks to redeem from an execution sale must do so within the time specified by the statute. He must also be one of the persons to whom the right is there given, and, unless the purchaser exonerates him from doing so, he must comply with every condition prescribed by the statute. Otherwise what he does cannot amount to a redemption.<sup>3</sup> Where, however, the person to whom redemption is to be made denies the right to redeem under any circumstances, and gives the debtor or other person seeking to redeem to understand that his right

*v. Davis*, 58 Ill. 411; *Wilcoxson v. Miller*, 49 Cal. 193; *Horton v. Maffitt*, 14 Minn. 288, 100 Am. Dec. 222; *Davis v. Seymour*, 16 Minn. 210; *Gilchrist v. Comfort*, 34 N. Y. 235; *Silliman v. Wing*, 7 Hill. 159; *Ex parte Bank of Monroe*, 7 Hill. 177, 42 Am. Dec. 61; *People v. Covell*, 18 Wend. 598; *People v. Sheriff of Broome*, 19 Wend. 87; *Waller v. Harris*, 20 Wend. 555, 32 Am. Dec. 590; 7 Paige, 167; *Lowry v. McGhee*, 8 Yerg. 242; *Farnsworth v. Howard*, 1 Cold. 215; *Hill v. Walker*, 6 Cold. 424, 98 Am. Dec. 465; *Fischer v. Eslaman*, 68 Ill. 78; 6 Chic. L. N. 52; *Burson v. Cooper*, 7 Chic. L. N. 213; *Durley v. Davis*, 69 Ill. 133. But under a statute requiring one who claims the right to redeem as the holder of a mortgage lien to state "truly the sum remaining unpaid on the mortgage at the time of claiming the right to redeem," it was held that a redemption was valid, supported by an affidavit as follows: "And this deponent says that, as near as he can estimate, the sum of \$2,288.29, including interest, now remains unpaid on said mortgage at this, the time of claiming said right to redeem." *People v. Clark*, 87 Hun, 201.

<sup>2</sup> *Dray v. Dray*, 21 Or. 59.

<sup>3</sup> *Beard v. Wilson*, 52 Ark. 290; *Bennett v. Wilson*, 122 Cal. 509, 68 Am. St. Rep. 61; *Wallace v. Monroe*, 22 Ill. App. 602; *Wooters v. Joseph*, 137 Ill. 13, 31 Am. St. Rep. 355; *Hyman v. Bogue*, 135 Ill. 9; *Robertson v. Van Cleave*, 129 Ill. 217; *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. Rep. 231; *Teabout v. Jaffray*, 74 Ia. 29, 7 Am. St. Rep. 466; *Whitaker v. Ashby*, 48 La. Ann. 117; *Maupin v. Blanton*, 93 Tenn. 422.

to do so will not, under any circumstances, be conceded, it is not necessary to do the vain act of complying with the different conditions prescribed by the statute, and compliance therewith must be regarded as waived for the purpose of sustaining a suit to enforce the right of redemption.<sup>4</sup> If a debtor's right of redemption has terminated, but one of his creditors is entitled to exercise this right, and does so, the judgment debtor is not permitted to take advantage of, or otherwise urge, mere irregularities in effecting the redemption, if the purchaser has accepted the redemption money.<sup>5</sup> Thus, in New York, a redemption by a creditor must be made at the sheriff's office. If made elsewhere, though in the same village, and though the sheriff receives the money, it is invalid.<sup>6</sup> The statutes of redemption apply in most of the states to foreclosure sales made under decrees in chancery, as well as to sales made under execution.<sup>7</sup> In Tennessee, real estate is subject to redemption only when sold for a debt. The sum decreed to be paid by a husband to his wife as alimony has been by the courts of that state said not to be a debt within the meaning of its redemption laws, and, hence, the sale of his real estate to pay such alimony is absolute.<sup>8</sup> In Arkansas, the right given to redeem real property sold under execution has been adjudged

<sup>4</sup> *Fitzgerald v. Kelso*, 71 Ia. 731.

<sup>5</sup> *Bozarth v. Largent*, 128 Ill. 95.

<sup>6</sup> *Morss v. Purvis*, 68 N. Y. 225.

<sup>7</sup> *Kent v. Laffan*, 2 Cal. 595; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Henderson v. Lowry*, 5 Yerg. 240; *Burrow v. Henson*, 2 Sneed, 658; *Freeland v. Harris*, 3 Sneed, 264. As to redemption from sales made under process issued out of the federal courts, see *Hepburn v. Kerr*, 9 Humph. 726, 51 Am. Dec. 685; *Turner v. Watkins*, 31 Ark. 429, overruling *Oliver v. McClure*, 28 Ark. 555.

<sup>8</sup> *White v. Bates*, 89 Tenn. 570.

to extend to all sales by final process from courts of law, and, hence, to include sales under attachment.<sup>9</sup>

**§ 314 a. Waiver of Defects in Redeeming.**—Whether the redemption is sought to be made by the judgment debtor, or his successor in interest, for the purpose of nullifying the sale, or by a redemptioner for the purpose of substituting himself in the place of the purchaser and becoming entitled to a conveyance should no further redemption be made, there is no doubt that formalities may be dispensed with by the assent of the parties interested, whether tacit or expressed; and that the redemption is as effectual as if the formalities which have been waived had been in fact performed.<sup>10</sup> If the redemption money is paid by one having no authority from the judgment debtor to pay it, to an attorney who has no authority from the purchaser to receive it, the latter by accepting the money from such attorney ratifies his act in receiving it from the debtor, and precludes himself from subsequently denying that a proper and effectual redemption has been made.<sup>11</sup> The expiration of the time in which the debtor is by law allowed to redeem entitles the purchaser to a conveyance which will make his title indefeasible. But until such conveyance is made, the purchaser may, irrespective of the lapse of time, permit the debtor to redeem, and by accepting the redemption money may “defeat his title or interest under his certificate of sale,

<sup>9</sup> *Beard v. Wilson*, 52 Ark. 290.

<sup>10</sup> *In Matter of Opening Eleventh Avenue*, 81 N. Y. 452; *Kell v. Worden*, 110 Ill. 310; *Colorado M. Co. v. McDonald*, 15 Colo. 516; *Hervey v. Krost*, 116 Ind. 268; *Bowen v. Van Gundy*, 133 Ind. 670; *Gilbert v. Husman*, 76 Ia. 241; *Sprandel v. Houde*, 54 Minn. 308.

<sup>11</sup> *Allen v. McGaughey*, 81 Ark. 252; *Kilbride v. Munn*, 55 Iowa, 445.

and annul such certificate.”<sup>12</sup> It has even been held that a deed to a redemptioner, whose right to redeem was based on a void judgment, is valid and effectual as against other creditors of the judgment debtor, where the purchaser had accepted the redemption money, on the ground that such deed was based on the original judgment and sale, and not on the void judgment under which the redemption had been made and accepted.<sup>13</sup> “Whatever may be the rule where another creditor of the judgment debtor claims the right to redeem, either from the purchaser or a redemptioner who resists the claim, it is clear that, as between the immediate parties to the redemption, the production of the papers mentioned in the statute may be waived.”<sup>14</sup> “It is already settled that the original or any subsequent purchaser may, so far as he is himself concerned, waive the production of papers, or the performance of any other conditions made for his benefit. (*Bank of Vergennes v. Warren*, 7 Hill, 91.) The immediate parties to the transaction may make what bargains they please. They may respectively insist on all the law will give them, or they may accept less.”<sup>15</sup> It has been held that, before the right to redeem has

<sup>12</sup> *Taggart v. McKinsey*, 85 Ind. 392; *Goddard v. Renner*, 57 Ind. 532; *Whiting v. Butler*, 29 Mich. 133.

<sup>13</sup> *Hare v. Hall*, 41 Ark. 372.

<sup>14</sup> *Bagley v. Ward*, 37 Cal. 129, 99 Am. Dec. 256.

<sup>15</sup> *People v. Ransom*, 4 Denio, 148; *Massey v. Westcott*, 40 Ill. 160; *Blair v. Chamblin*, 39 Ill. 521, 89 Am. Dec. 322. In *Bagley v. Ward*, 37 Cal. 129, 99 Am. Dec. 256, *People v. Fralick*, 12 Mich. 234, and *People v. Ransom*, 4 Denio, 148, the rule is maintained that where the purchaser has waived some of the formalities prescribed by statute, the redemption is valid against him, and also against creditors of the defendant; but this rule is denied, so far as creditors are concerned, in *People v. Ransom*, 2 N. Y. 490. A purchaser may release or discharge his right without the consent of other creditors. *Ex parte Peru Iron Co.*, 7 Cow. 540.



been exercised, the purchaser may, by his agreement or conduct, estop himself from insisting upon a redemption within the time and in the manner required by the statute. Hence, if he promises the judgment debtor to furnish a statement in due season of the amount required to redeem and of the date when the right of redemption must be exercised, and that this right may be exercised after as well as before the time specified by the statute, this is equivalent to a temporary waiver, and the right may be exercised after such time, if there has been no notice to the debtor to the contrary. "It is competent for the party to waive his strict legal rights as to the time of redemption, and agree to allow the redemption at a subsequent time, and if the acts relied on to constitute such waiver are equivalent to an estoppel in pais, he is bound by them, and a reasonable time after notice must be given the other party in which to redeem." <sup>16</sup>

**§ 315. Laws Operating Retroactively on Rights of Redemption.**—The state and national courts have differed with respect to the power of the state legislatures to enact redemption laws which shall apply to pre-existing contracts. So far as this difference has been ascertained it must be conceded that the opinions of the national courts must prevail, but it may be contended that they have not yet spoken respecting sales under execution except in the case of judgments or decrees foreclosing liens upon property, and that the law concerning ordinary execution sales must still be sought in the state courts. We shall first refer to the decisions of those courts before they were modified by the opinions of the supreme court of the United States

<sup>16</sup> Tice v. Russell, 43 Minn. 66.

upon the subject. They maintain that whether an execution sale shall be with or without redemption depends upon the law in force at the time it is made. Changes in the law may be made from time to time, and if made are, in most states, allowed to operate upon antecedent debts or judgments. Debtors are not deemed to have a vested right to have their property sold under the redemption law in force at the time the debt was created.<sup>17</sup> Nor, on the other hand, has the judgment creditor a vested right to have his debtor's property sold under the law in force at the time his debt was contracted, or judgment rendered, or changing the rate of interest to be paid to the purchaser to effect a redemption. If, at any time prior to the sale, a statute is enacted making execution sales subject to redemption for a reasonable period, such statute will control sales made under pre-existing as well as under subsequent judgments.<sup>18</sup> Sometimes, though this view did not wholly prevail, it was said that the purchaser had no right to insist that the law was unconstitutional, and must submit to a redemption as provided for therein, if neither the debtor nor the creditor objected.<sup>19</sup> Even after the sale has been made, the debtor's right to redeem is not entirely beyond legislative control; for the time for redemption may, by a change in the law, probably be shortened after the sale, providing a reasonable period in which to make payment is left to the debtor.<sup>20</sup> But the right of the

<sup>17</sup> Ante, § 294.

<sup>18</sup> *Davis v. Rupe*, 114 Ind. 588; *Robertson v. Van Cleave*, 129 Ind. 217; *Moore v. Martin*, 38 Cal. 428, adopting as the opinion of the court the dissenting opinion of Heydenfeldt, J., in *Thorne v. San Francisco*, 4 Cal. 154; *Tuolumne Red. Co. v. Sedgwick*, 15 Cal. 516.

<sup>19</sup> *Sullivan v. Berry*, 83 Ky. 198, 4 Am. St. Rep. 147.

<sup>20</sup> *Butler v. Palmer*, 1 Hill, 324; *Smith v. Packard*, 12 Wis. 871.

purchaser to a conveyance, or to repayment at the termination of the period allowed for redemption, is deemed to rest upon a contract, which the legislature will not be permitted to impair. Hence, while the time for redemption may probably be shortened, it certainly cannot be prolonged by any law enacted after the sale.<sup>21</sup>

Whether redemption laws can be applied to pre-existing judgments and contracts is dependent upon another question, namely, will such an application impair the obligation of a contract, for it must be conceded, (1) that no state can pass any law impairing the obligation of contracts, and (2) that whether a statute offends this constitutional inhibition must finally be determined by the supreme court of the United States. That a statute authorizing a redemption from foreclosure sales could not be applied to sales under pre-existing mortgages without impairing the obligation of the contract was decided by that court at a comparatively early day.<sup>22</sup> Nevertheless, when the question was long subsequently presented to some of the state courts, they were unwilling to admit that statutes creating or extending the time within which to redeem from foreclosure sales impaired the obligation of the contract, and hence sustained such statutes and applied them to antecedent obligations.<sup>23</sup> In other states the question had been more disinterestedly considered

Contra, *Cargill v. Power*, 1 Mich. 369. *Reynolds v. Walker*, 6 Cold. 221, seems to support the same view.

<sup>21</sup> *Goenen v. Schroeder*, 8 Minn. 387; *Dikeman v. Dikeman*, 11 Paige, 484; *Robinson v. Howe*, 13 Wis. 341; *Reynolds v. Baker*, 6 Cold. 221; *Henderson v. Felker*, 1 Helsk. 271.

<sup>22</sup> *Howard v. Bugbee*, 24 How. 461.

<sup>23</sup> *Moore v. Marten*, 38 Cal. 428; *Beverly v. Barnitz*, 55 Kan. 466, 49 Am. St. Rep. 257; *State v. Gillian*, 18 Mont. 94; *State v. Sears*, 43 Pac. Rep. 482, overruled, 29 Or. 508, 54 Am. St. Rep. 808.

and more correctly determined.<sup>24</sup> It was finally presented to the supreme court of the United States, which settled it by adjudging that a law purporting to extend the time for redemption could not be applied to pre-existing mortgages.<sup>25</sup>

<sup>24</sup> *Wilbur v. Campbell*, Idaho (1896); *Watkins v. Glenn*, 55 Kan. 417; *Collins v. Collins*, 79 Ky. 88. •

<sup>25</sup> *Barnitz v. Beverly*, 163 U. S. 18. In this case the court said: "We, of course, have nothing to do with the fairness or policy of such enactments as respects those who choose to contract in view of them. But it seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where, in a mortgage, an entire estate is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months? Martha Barnitz held Kirtland's notes secured by a mortgage. Of course, under the contract thus created, she had a right to resort to other property of the debtor to make up for any deficiency remaining after the sale of the real estate mortgaged. As the law stood at the time the contract was made, if Kirtland, either by purchase at the sale or by subsequent transactions, became the owner of the real estate, Mrs. Barnitz had a legal right to levy thereon and subject it to the payment of the remnant of her debt. But this law, as we have seen, in express terms declares that this real estate shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold. This cannot be held to mean merely that the land is sold free from existing liens, for such would be the legal effect of the sale at any rate. It plainly means that the balance of the debt shall not be made out of the lands, even if and when they become the property of the debtor. Nor can it be said that such a question is not now before us. What we are now considering is, whether the change of remedy was detrimental to such a degree as to amount to an impairment of the plaintiff's right; and, as this record discloses that the sale left a portion of the plaintiff's judgment unpaid, it may be fairly argued that this provision of the act does not deprive the plaintiff of a right inherent in her contract. When we are asked to put this case within the rule of those cases in which we have held that it is for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby im-



It is true that the decisions in the national courts have been only in cases involving the application of the law to debts secured by mortgage. We do not, however, understand that the fact that the debt was secured gives it any additional obligation or inviolability. It merely selects specific property out of which payment may be coerced, notwithstanding any subsequent transfers or encumbrances by the mortgagor. Where the debt is unsecured, the creditor still has the right to sell, under execution, any property of the debtor subject to sale, and a statute creating or extending the right to redeem operates to impair the obligation of the contract to the same extent as if the debt were secured by specific property. Such was the opinion of the court of appeals of Kentucky, maintain-

paired, we are bound to consider the entire scheme of the new statute, and to have regard to its probable effect on the rights of the parties. It is contended that the right to redeem granted by the new statute only operates on the purchaser and not on the mortgagee, as such. This very argument was foreseen and disposed of in *Bronson v. Kinzie*, 1 How. 311, where this court said: 'It, the new act, declares that, although the mortgaged premises should be sold under the decree, yet that the equitable estate of the mortgagor shall not be extinguished, but shall continue for twelve months after the sale; and it, moreover, gives a new and like estate to the judgment creditors, to continue for fifteen months. If such rights may be added to the original contract by subsequent legislation, it would be difficult to say at what point they must stop. An equitable estate in the premises may, in like manner, be conferred upon others; and the right to redeem may be so prolonged as to deprive the mortgagee of the benefit of his security by rendering the property unsalable for anything like its value. This law gives to the mortgagor and to the judgment creditors (meaning creditors other than the mortgagee) an equitable estate in the premises, which neither of them would have been entitled to under the original contract; and these new interests are directly and materially in conflict with those which the mortgagee acquired when the mortgage was made. Any such modification of a contract by subsequent legislation, against the consent of one of the parties, unquestionably impairs its obligations, and is prohibited by the constitution.' "

ing that the "law embraces the remedy which includes all the legal means allowed by law at the creation of the contract to enforce its performance, or redress the injury resulting from its nonperformance."<sup>26</sup>

**§ 316. The Time within Which Redemption from execution and other forced sales may be made is limited by the statutes of the several states. The redemption period, as fixed by these statutes, varies greatly. The usual period is a year, or twelve months,<sup>27</sup> but in several states it is six months.<sup>28</sup> In Kansas the period is eighteen months,<sup>29</sup> and in Alabama and Tennessee it is two years.<sup>30</sup> In some of the states no fixed period for redemption is recognized, redemption being allowed at any time before the confirmation of the sale,<sup>31</sup> or at any time before the execution of the sheriff's deed, which must follow the confirmation of the sale,<sup>32</sup> or within four months after such confirmation.<sup>33</sup> Under such a provision the perfection of an appeal from an order confirming a sale, together with the execution and approval of the requisite appeal bond, extends the**

<sup>26</sup> *Collins v. Collins*, 79 Ky. 88.

<sup>27</sup> Dig. Ark. Stat., 1894, § 3113; Cal. Code Civ. Proc., § 702; Starr & Curtis's Ann. Ill. Stats., ch. 77, § 16; Code of Iowa, 1897, § 4045; Ky. Stat., 1894, §§ 1684, 2364; Rev. Stats. Me., 1883, p. 620, § 39; Pub. Stats. Mass., 1882, p. 1012, § 32; Minn. Stats., 1894, § 5473; Mont. Code Civ. Proc., 1895, § 1235; N. Y. Code Civ. Proc., 1895, § 1446; Rev. Code N. D., 1895, § 5544; Sanborn & Berryman Ann. Stats. Wis., § 3001.

<sup>28</sup> Mills' Ann. Stat. Colo., 1891, § 2547; Gen. Stats. Nev., 1885, § 3255; Rev. Stats. Utah, 1898, § 3262.

<sup>29</sup> Gen. Stats. Kan., 1897, § 521.

<sup>30</sup> Code of Alabama, 1886, § 1879; Code of Tenn., 1884, § 2947.

<sup>31</sup> Comp. Stats. Neb., 1897, § 6088; *Gosmunt v. Gloe*, 55 Neb. 709; Glauque's Rev. Ohio Stats., 7th ed., § 5398.

<sup>32</sup> Ballinger's Ann. Codes and Stats. Wash., § 5295.

<sup>33</sup> Hill's Ann. Code of Or., 2d ed., § 303.

period of redemption until, by affirmance on appeal, such confirmation becomes operative.<sup>34</sup>

Numerous provisions are found in the statutes of the different states varying the period of redemption as to different classes of persons to whom the right of redemption is given. The right of redemption may be exclusively in the execution defendant for a part of the redemption period, in which case redemptioners are given the right concurrent with the execution defendant for the balance of the period,<sup>35</sup> or the right may be in the execution defendant exclusively for the entire redemption period, and redemptioners be allowed a period in addition thereto in which to exercise their right of redemption.<sup>36</sup> If premises sold under execution are abandoned, or not occupied in good faith, a court or judge may, in Kansas, upon proper showing, fix the period for redemption thereof at six months instead of the ordinary period of eighteen months.<sup>37</sup>

The right to redeem must be exercised within the statutory period.<sup>38</sup> After the expiration of this time, the purchaser's right to a conveyance of the property becomes absolute, and the time will not be extended by the courts, except under special circumstances, showing that a fraud would otherwise be perpetrated upon the defendant.<sup>39</sup> The defendant ordinarily cannot, by any act of his own, as by filing a bill to redeem, prolong

<sup>34</sup> Philadelphia M. etc. Co. v. Gustus, 55 Neb. 435.

<sup>35</sup> Code of Iowa, 1897, § 4046; Gen. Stats. Kan., 1897, § 521.

<sup>36</sup> Mill's Ann. Stats. Colo., 1891, § 2548; Starr & Curtis's Ann. Ill. Stats., ch. 77, § 20; Minn. Stats., 1894, § 5473; N. Y. Code Civ. Proc., 1895, § 1454. Compare Hill's Ann. Code of Or., 2d ed., § 301.

<sup>37</sup> Gen. Stats. Kan., 1897, § 521.

<sup>38</sup> Teabout v. Jaffray, 74 Ia. 78, 7 Am. St. Rep. 466; Bethel v. Smith, 83 Ky. 84.

<sup>39</sup> Ross v. Mead, 5 Gilm. 171; Lowry v. McGhee, 8 Yerg. 242; Teabout v. Jaffray, 74 Ia. 28, 7 Am. St. Rep. 466.

the time designated by statute.<sup>40</sup> Physical or mental debility or minority do not afford sufficient ground in equity for allowing a party to redeem after the expiration of the statutory period.<sup>41</sup> One who, through culpable negligence or ignorance of the law, fails to redeem within the statutory period, has no claim to relief in chancery.<sup>42</sup> If the title is in dispute, or the validity of the judgment and sale is questioned, it has been held that a court of equity has inherent power to extend the time for redemption, until the issues raised by the complainant's bill can be determined.<sup>43</sup> Until the expiration of the time for redemption, the officer has no power to execute a conveyance in pursuance of the sale. If he assumes to exercise such power, his act is void.<sup>44</sup> With respect to the computation of the time allowed to redeem, the following rules prevail: The word "month" is construed to mean a calendar month;<sup>45</sup> the day of the sale is excluded;<sup>46</sup> a redemption may be

<sup>40</sup> *Hughes v. Feeter*, 23 Iowa, 547.

<sup>41</sup> *Wallace v. Munroe*, 22 Ill. App. 602; *Henderson v. Craig*, 179 Ill. 395.

<sup>42</sup> *Campau v. Godfrey*, 18 Mich. 27, 100 Am. Dec. 133.

<sup>43</sup> *Carroll v. McCullough*, 63 N. H. 98; compare *Tilley v. Bonney*, 123 Cal. 118.

<sup>44</sup> *Gross v. Fowler*, 21 Cal. 392; *Gorham v. Wing*, 10 Mich. 486; *Hall v. Yoell*, 45 Cal. 584; *Moore v. Martin*, 38 Cal. 428. A deed executed before the time for redemption has expired does not constitute even color of title. *Bernal v. Gleim*, 33 Cal. 668.

<sup>45</sup> *Gross v. Fowler*, 21 Cal. 392; *Strong v. Birchard*, 5 Conn. 361; *Brewer v. Harris*, 5 Gratt. 285; *Snyder v. Warren*, 2 Cow. 518, 14 Am. Dec. 519; *Sheets v. Selden's Lessee*, 2 Wall. 190.

<sup>46</sup> *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231; *Bigelow v. Willson*, 1 Pick. 485; *Gorham v. Wing*, 10 Mich. 486; *Teucher v. Hiatt*, 23 Iowa, 527, 92 Am. Dec. 440; *Snyder v. Warren*, 2 Cow. 518, 14 Am. Dec. 519; *Jones v. Planters' Bank*, 5 Humph. 619, 42 Am. Dec. 471. Under chancery sales in Tennessee, the time for redemption does not commence running until the sale is confirmed. *Henderson v. Lowry*, 5 Yerg. 240; *Wood v. Morgan*, 4 Humph. 371. If a sale is made on the ninth day of December, and the statute allows

made at any time on the last day, though after business hours;<sup>47</sup> if the last day falls on Sunday, redemption must be made on Saturday.<sup>48</sup> In Illinois the defendant has the exclusive right of redemption for one year after the sale. If he fails to exercise this right within the statutory period, then certain of his creditors have the right to redeem within three months after the termination of such year. A redemption prematurely made by a creditor is treated as valid, unless the defendant afterward exercises his right to redeem.<sup>49</sup> In Iowa, the judgment debtor has, for the first six months after the sale, the exclusive right to redeem from it. Then for the period of three months, any creditor of the judgment debtor holding a lien on the real estate, as well as the debtor, may redeem. After the expiration of these three months the right of the debtor to redeem again becomes exclusive, and continues for three

one year in which to redeem, a redemption may be made on or before the ninth day of the following December. *Roan v. Rohrer*, 72 Ill. 582; *Perham v. Kuper*, 61 Cal. 331.

<sup>47</sup> *Ex parte Bank of Monroe*, 7 Hill, 177, 42 Am. Dec. 61; *Jessup v. Carey*, 61 Ind. 584.

<sup>48</sup> *People v. Luther*, 1 Wend. 42. In Indiana, it was held that in such a case redemption might properly be made on the following Monday. *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231. In New York, it is provided by section 1454 of the Code of Civil Procedure that "a creditor who might have redeemed within fifteen months after the sale . . . . may redeem from any other redeeming creditor, although the fifteen months have elapsed, provided that he thus redeems within twenty-four hours after the last previous redemption." It appearing that the "last previous redemption" was made on Saturday, it was held that, since the redemption, under the section quoted, must be at the sheriff's office, which was not required to be open on Sunday, redemption might properly be made on the following Monday. *Porter v. Pierce*, 43 Hun, 11, 120 N. Y. 217.

<sup>49</sup> *Blair v. Chamblin*, 39 Ill. 521, 89 Am. Dec. 322; *Massey v. Westcott*, 40 Ill. 160; *Wilson v. Conklin*, 22 Iowa, 452.

months longer, or until one year from the day of sale.<sup>50</sup> The person entitled to redeem may be prevented from doing so by the act, fraud, or agreement of the purchaser. Where this is the case, courts of equity will grant relief.<sup>51</sup> If a purchase at an execution sale is shown, even by parol evidence, to have been made in pursuance of an agreement between the defendant and the purchaser, by which the latter was to hold his purchase for the benefit of the former, or was to allow the latter longer than the statutory period to redeem, the agreement will be enforced in equity.<sup>52</sup> In such a case, if a day is fixed by the parties as the limit of the time in which redemption may be made, and on that day the defendant demands to know the amount required to redeem, and that amount can be ascertained only by an accounting between the parties, and the purchaser refuses to account or to give the desired information, the defendant's right is not lost, but continues until an accounting can be had.<sup>53</sup>

So, if any agreement is entered into subsequently to the sale, though by parol, the substance of which is that the purchaser, or other holder of the certificate of sale, will treat it as a mere security, or will give a definite time in which to redeem, it will be enforced. The effect of such an agreement is to prevent any effort on the part of the debtor to redeem within the time designated by the statute; and not to enforce it in his favor, when it had been the means of lulling him into inac-

<sup>50</sup> *George v. Hart*, 56 Iowa, 706.

<sup>51</sup> *Guinn v. Locke*, 1 Head, 110; *Southard v. Pope*, 9 B. Mon. 264; *Greenup v. Porter*, 3 Scam. 64; *Miller v. Lewis*, 4 N. Y. 554.

<sup>52</sup> *Combs v. Little*, 3 Green Ch. 310, 40 Am. Dec. 207; *Marlatt v. Warwick*, 18 N. J. Eq. 108; *Turner v. King*, 2 Ired. 132, 38 Am. Dec. 679. See § 337.

<sup>53</sup> *Halsted v. Tyng*, 18 N. J. Eq. 375.

tion, would be to pervert it into a cruel and fatal decoy. This the courts will not permit, nor will they heed the plea that the contract cannot be received in evidence because within the statute of frauds.<sup>54</sup> But a promise to permit the debtor to redeem, made after his right to do so had terminated, cannot be the means of decoying him into the nonexercise of his right. It is within the statute of frauds, and cannot be enforced unless based upon a consideration.<sup>55</sup> An agreement to extend the time for redemption does not transform the purchaser into a mere lienholder. If the defendant does not redeem within the period fixed by the agreement, a conveyance may be executed as in other cases.<sup>56</sup> But if the agreement has been partly executed by the payment of a portion of the amount required to redeem, the status of the purchaser and the judgment debtor is not well settled. In Indiana, the debtor, though the time granted him has expired, still retains the right to redeem, and the purchaser is regarded as merely holding the land as security.<sup>57</sup> This is also the rule in Kentucky.<sup>58</sup> In Illinois, the rule is the same if the purchaser retains the money paid him; but he may probably "tender back the amount received, and give notice that unless the amount due should be paid within a reasonable time, he will rescind the contract, and take out a deed."<sup>59</sup> In Tennessee, the purchaser, at the expiration of the time granted by him, is entitled to a convey-

<sup>54</sup> *McMakin v. Schenck*, 98 Ind. 264; *Southard v. Pope's Ex'r*, 9 B. Mon. 261; *Butt v. Butt*, 91 Ind. 305; *Shade v. Creviston*, 93 Ind. 591; *Beatty v. Brummett*, 94 Ind. 76.

<sup>55</sup> *Lucas v. Nichols*, 66 Ind. 41.

<sup>56</sup> *Southard v. Pope*, 9 B. Mon. 264; *Ferguson v. Smith*, 7 Bush, 76; *Tarkington v. Corley*, 59 Iowa, 28.

<sup>57</sup> *Felton v. Smith*, 84 Ind. 485; *Hughart v. Lenburg*, 45 Ind. 408.

<sup>58</sup> *Southard v. Pope*, 9 B. Mon. 261.

<sup>59</sup> *Kaufman v. Smallwood*, 36 Ill. 504, 87 Am. Dec. 230.

ance and answerable to the judgment debtor for the return to him of the amount paid.<sup>60</sup>

If the purchaser does not pay his bid at the time of the sale, nor for a considerable period thereafter, but on making payment has the certificate delivered to him, and dated as of the day of the sale, the time in which the defendant may redeem will, in equity, as against the purchaser and all persons claiming under him with notice, be computed from the day of payment, and not from the day of the sale. This rule is especially applicable in cases where it was impossible for the defendant, from an inspection of the papers in the case, and of the public records, to ascertain that a sale had been made.<sup>61</sup> In Indiana, it seems probable that the right of redemption may be exercised by computing the time therefor as commencing to run only from the actual payment of the bid, without resorting to a suit in equity. When a judicial or execution sale is by law required to be for cash, the courts of that state reason that the sheriff has no authority to execute any certificate of sale until payment has been made; "and, therefore, that a sale of real estate by a sheriff upon execution or order of sale cannot be regarded as completed or consummated, so far, at least, as the right of redemption is involved, until the purchase money is fully paid, and that the time allowed by statute for redemption commences to run from that time, and not before."<sup>62</sup> In Nebraska, however, where redemption is allowed at any time before the confirmation of a sale, the failure of a purchaser to pay the amount of his bid prior to the

<sup>60</sup> *Rambo v. Donelly*, 9 Baxt. 418.

<sup>61</sup> *Maina v. Elliott*, 51 Cal. 8; *Briscoe v. York*, 53 Ill. 484; *York v. Briscoe*, 67 Ill. 533.

<sup>62</sup> *Liggett v. Firestone*, 96 Ind. 280.



confirmation is held not to render the sale void, nor to extend the statutory period for redemption.<sup>63</sup> When a mortgage is foreclosed, those encumbrancers who were made parties to the suit, and bound by the decree, must exercise their right of redemption in the time and manner prescribed by statute; but those encumbrancers existing prior to the suit, and not made parties thereto, are not debarred of their right of redemption which existed independent of the statute.<sup>64</sup> A judgment creditor whose lien is subordinate to a mechanic's lien under which a sale is had is not deprived of his right to redeem by being made a party to the foreclosure proceedings.<sup>65</sup>

**§ 317. The Classes of Persons Who may Redeem** property which has been sold under execution are designated in the several state statutes upon this subject. These statutes, while not entirely similar in their purport, usually agree in conferring the right of redemption on three classes of persons, namely: 1. The defendant in execution, and his successors in interest; 2. Creditors having liens by judgment; and 3. Creditors having liens by mortgage. Persons belonging to the second and third classes are usually called redemptioners.<sup>66</sup> In some states, the statutes do not confer a

<sup>63</sup> Gosmunt v. Gloe, 55 Neb. 709.

<sup>64</sup> Montgomery v. Tutt, 11 Cal. 307; Frink v. Murphy, 21 Cal. 108, 81 Am. Dec. 149; Holmes v. Bybee, 34 Ind. 262; Proctor v. Baker, 15 Ind. 178; Murdock v. Ford, 17 Ind. 52; Wright v. Howell, 35 Iowa, 288; Haskell v. State, 31 Ark. 91. Similarly held where the foreclosure was of a mechanic's lien, instead of a mortgage. Nash v. Adams, 55 Minn. 46; American B. etc. Co. v. Lynch, 10 S. D. 410.

<sup>65</sup> Boynton v. Pierce, 151 Ill. 197.

<sup>66</sup> Cal. Code Civ. Proc., § 701; Mills' Ann. Stats. Colo., 1891, §§ 2547, 2548; Ann. Ind. Stats., 1894, §§ 780, 783; Code of Iowa, 1897, §§ 4045, 4046; Gen. Stats. Kan., 1897, §§ 521, 522; Howell's Ann. Mich. Stats., 1882, §§ 6121, 6126; Stats. Minn., 1894, § 5472; Mont.

right of redemption upon all these parties, the right being confined more particularly to the execution defendant and those claiming under or through him.<sup>67</sup> Various other parties are also made redemptioners by the statutes of some states, as joint tenants, cotenants, or part owners of the property sought to be redeemed.<sup>68</sup> In Montana it is provided that if the officers of a corporation entitled to redeem from an execution sale refuse to redeem, a stockholder may do so.<sup>69</sup> In Illinois, a probate claimant whose claim has been allowed may redeem real estate of his deceased debtor,<sup>70</sup> but in the absence of express statutory provision, such a person is not entitled to redeem.<sup>71</sup> He is not "a creditor with a lien."

The fact that the defendant has parted with his interest in the property does not, in most states, prevent his making a valid redemption thereof. He is entitled to redeem in his capacity of judgment debtor, irrespective of his other relations to the property sold.<sup>72</sup> Hence, a

Code Civ. Proc., 1895, § 1234; Gen. Stats. Nev., 1885, § 3254; Rev. Code N. D., 1895, § 5540; Hill's Ann. Laws Or., 2d ed., § 300; Rev. Stats. Utah, 1898, § 3261.

<sup>67</sup> Dig. Ark. Stats., 1894, § 3113; Ky. Stats., 1894, §§ 1684, 2364; Rev. Stats. Me., 1883, p. 620, § 42, p. 621, § 48; Comp. Stats. Neb., 1897, § 6008; Glauque's Rev. Stats. Ohio, 7th ed., § 5398 a; Code of Tenn., 1884, § 2949; Sanborn & Berryman Ann. Stats. Wis., § 3002.

<sup>68</sup> Starr & Curtis' Ann. Stats. Ill., 1896, c. 77, § 26; Ann. Ind. Stats., 1894, § 781; Code of Iowa, 1897, § 4060; Sanborn & Berryman Ann. Stats. Wis., § 3004.

<sup>69</sup> Mont. Code Civ. Proc., 1895, § 1234.

<sup>70</sup> Starr & Curtis' Ann. Stats. Ill., 1896, c. 77, § 27; *Wilson v. Schneider*, 124 Ill. 628.

<sup>71</sup> *Whitney v. Burd*, 29 Minn. 203. Compare *Byer v. Healy*, 84 Iowa, 1.

<sup>72</sup> *Yoakum v. Bower*, 51 Cal. 539; *Jones v. Planters' Bank*, 5 Humph. 619, 42 Am. Dec. 471; *Livingston v. Arnoux*, 11 Alb. L. J. 111; 56 N. Y. 507; *Harvey v. Spaulding*, 16 Iowa, 397, 85 Am. Dec. 526. Hence a mortgagor can redeem from his own mortgage,

defendant may redeem after he has been compelled to transfer all his assets to a receiver.<sup>73</sup> A transfer by the defendant does not prejudice the right of his creditors having liens upon the land to redeem.<sup>74</sup> A grantee, assignee, or other successor in interest of a judgment debtor, may redeem.<sup>75</sup> A judgment debtor may convey or assign his interest in property sold under execution for the purpose of having the certificate of redemption issued in the name of his grantee.<sup>76</sup> But a transfer which can be recognized at law is essential. Hence, a purchaser at an execution sale, who is entitled to but has not received his deed, cannot redeem as the grantee of the defendant in such execution.<sup>77</sup> Similarly, one to whom a judgment debtor, after an execution sale of his realty, executes a conveyance thereof, absolute on its face, but made for the purpose of security, is not a vendee or assignee of the defendant within the meaning of a redemption statute.<sup>78</sup> In Iowa, a defendant who whether he had any title to the property mortgaged or not. *Lorenzana v. Camarillo*, 45 Cal. 125.

<sup>73</sup> *Livingston v. Arnoux*, 11 Alb. L. J. 111; 56 N. Y. 507; 15 Abb. Pr., N. S., 158; *Elsworth v. Muldoon*, 15 Abb. Pr., N. S., 440; 46 How. Pr. 246. In apparent conflict with the other authorities is *Husted v. Dakin*, 17 Abb. Pr. 137. In that case, it was determined that a judgment debtor could not redeem because his interest in the property had been divested by a sale under an antecedent mortgage.

<sup>74</sup> *McLean v. Harris*, 14 Lea, 510.

<sup>75</sup> *Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369; *Harms v. Palmer*, 73 Iowa, 446, 5 Am. St. Rep. 691; *Rosenberg v. Croisan*, 18 Or. 470; *Campbell v. Atwood*, (Tenn. Ch.), 47 S. W. 691; *Hepburn v. Kerr*, 9 Humph. 726, 51 Am. Dec. 685; *Stockett v. Taylor*, 3 Md. Ch. 537; *Stoddard v. Forbes*, 13 Iowa, 296; *Harvey v. Spaulding*, 16 Iowa, 397, 85 Am. Dec. 526; *Watson v. Hannum*, 10 Smedes & M. 521. The trustees of an absconding, concealed, or nonresident debtor are his successors in interest to such an extent that they can redeem his property. *Phyfe v. Riley*, 15 Wend. 248, 30 Am. Dec. 55.

<sup>76</sup> *Southern C. L. Co. v. McDowell*, 105 Cal. 99.

<sup>77</sup> *Lathrop v. Ferguson*, 22 Wend. 116.

<sup>78</sup> *Robertson v. Moline M. & S. Co.*, 88 Iowa, 463.

takes an appeal, or stays execution on the judgment, is by statute precluded from redeeming;<sup>79</sup> but his vendee may nevertheless redeem.<sup>80</sup> In that state, the statute does not, in direct terms, give the right to redeem to a grantee or successor in interest of the defendant. It merely provides that "the defendant may redeem real property at any time within one year from the day of sale as herein provided, and will in the meantime be entitled to the possession of the property." Owing to the latter part of this sentence, the word "defendant" was construed to include all persons who had become entitled to the possession of the property, and hence, to entitle the defendant's grantee to redeem.<sup>81</sup> Creditors having no mortgage lien, and not having reduced their claims to certainty by judgment, are not entitled to redeem.<sup>82</sup> Where, however, a right of redemption is given to a creditor having a lien, one who has brought suit upon a contract and attached the real estate of the defendant is entitled to redeem.<sup>83</sup> In New Jersey an unrecorded mortgage is invalid against a judgment creditor of the mortgagor, having no notice of it. Hence, if such creditor purchases the mortgaged premises under his own execution, they cannot be redeemed and taken from him by the holder of such unrecorded mortgage.<sup>84</sup> A conveyance made for the purpose of defrauding creditors is generally void at law as well as in equity, as against them, and they may, for most purposes, treat it as nonexistent. It has been held in

<sup>79</sup> *Dobbins v. Lusch*, 53 Iowa, 304.

<sup>80</sup> *Thayer v. Coldren*, 57 Iowa, 110.

<sup>81</sup> *Thayer v. Coldren*, 57 Iowa, 110.

<sup>82</sup> *Woods v. McGavock*, 10 Yerg. 133; *Thomason v. Scales*, 12 Ala. 309; *Hopkins v. Webb*, 9 Humph. 519.

<sup>83</sup> *Atwater v. Manchester S. Bank*, 45 Minn. 341.

<sup>84</sup> *Condit v. Wilson*, 36 N. J. Eq. 370.

Iowa that it constitutes an insuperable obstacle to their redeeming the property under a judgment in their favor, entered against the grantor subsequently to the execution of such conveyance. But this decision is based upon the ground that, in that state, the fraudulent transfer conveyed the legal title, which could not be fully divested from the fraudulent grantee otherwise than by some proceeding in chancery.<sup>85</sup> Whatever may be the law of Iowa, such proceedings are not requisite elsewhere.<sup>86</sup> Hence, we cannot regard the Iowa decision as having any relevancy, when the same question arises for decision in other states. The statutory right of redemption, it may be observed in this connection, is entirely distinct from the purely equitable right of a grantee of personal property fraudulently conveyed to redeem from a judgment obtained by the creditors of the fraudulent grantor against him.<sup>87</sup>

A person is entitled to redeem if he is the owner of the judgment. Hence, it is immaterial whether he is the plaintiff in whose favor it was entered,<sup>88</sup> or the assignee of such plaintiff.<sup>89</sup> It is also immaterial

<sup>85</sup> *Howland v. Knox*, 59 Iowa, 46.

<sup>86</sup> *Ante*, § 136.

<sup>87</sup> *Teabout v. Jaffray*, 74 Ia. 29, 7 Am. St. Rep. 466.

<sup>88</sup> *Prescott v. Everts*, 4 Wis. 314; *Kent v. Laffan*, 2 Cal. 595; *Seevers v. Wood*, 12 Iowa, 295.

<sup>89</sup> *Aylesworth v. Brown*, 10 Barb. 167; *Ex parte Newell*, 4 Hill, 608; *Van Rensselaer v. Sheriff*, 1 Cow. 443; *Ex parte Raymond*, 1 Denio. 272; *Beekman v. Bunn*, Hill & D. 265; *Sweezy v. Chandler*, 11 Ill. 445. Where one who was apparently the owner of a junior judgment, which he had in fact assigned, redeemed from an execution sale, and procured an assignment of the certificate of purchase, the court, without passing upon the validity of the redemption, held that, in the absence of a redemption from himself, he was entitled to a sheriff's deed as an assignee of the certificate of purchase. *Rush v. Mitchell*, 71 Ia. 333.

whether the judgment is the result of contested litigation, or was confessed<sup>90</sup> for the purpose of creating a right to redeem<sup>91</sup> after the sale was made.<sup>92</sup> The proposition must, however, be considered as relating only to valid judgments confessed or entered in good faith, and has no application to judgments void for fraud as against prior redemptioners.<sup>93</sup> A statute giving the right of redemption to judgment creditors, who, "without fraud or collusion, had obtained such judgment before the sale of the land, or within two years thereafter, except by confession of the debtor," excludes all creditors by confessed judgments, whether entered before or after the sale.<sup>94</sup> In nearly all the states the judgment under which redemption is made must be a lien on the property redeemed.<sup>95</sup> Hence, an estate for years cannot be redeemed, because it is a chattel interest, to which judgment liens do not extend.<sup>96</sup> But if the judgment lien is subsisting as against the defendant and his heirs, it is no objection that it has become dormant as against bona fide pur-

<sup>90</sup> *Couthway v. Berghaus*, 25 Ala. 393.

<sup>91</sup> *Snyder v. Warren*, 2 Cow. 518, 14 Am. Dec. 519; *Martin v. Judd*, 60 Ill. 78; *Arnold v. Gifford*, 62 Ill. 250.

<sup>92</sup> *Couthway v. Berghaus*, 25 Ala. 393; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Pollard v. Taylor*, 13 Ala. 604.

<sup>93</sup> *Bennett v. Wilson*, 122 Cal. 509, 68 Am. St. Rep. 61.

<sup>94</sup> *Mack v. Owen*, 83 Ala. 177.

<sup>95</sup> *Ex parte Lawrence*, 4 Cow. 417, 15 Am. Dec. 386; *People v. Easton*, 2 Wend. 297; *Hill v. Pixley*, 63 Barb. 200; *Ex parte Stevens*, 4 Cow. 133; *Ex parte Elwood*, 1 Denio, 633; *Russell v. Allen*, 10 Paige, 249. Hence, the holder of a judgment entered by a justice of the peace in another state is not qualified to redeem. *Freeman v. Jordan*, 17 Ala. 500. In Illinois the judgment need not be a lien. *Sweezy v. Chandler*, 11 Ill. 445; *Karnes v. Lloyd*, 52 Ill. 113; but compare *Wooters v. Joseph*, 137 Ill. 113, 31 Am. St. Rep. 355.

<sup>96</sup> *Merry v. Hallett*, 2 Cow. 497; *Ex parte Wilson*, 7 Hill, 150; *People v. Westervelt*, 17 Wend. 674.

chasers from defendant.<sup>97</sup> A judgment against an execution defendant, void because entered without jurisdiction, will not support a redemption.<sup>98</sup> If the property is sold several times, a judgment creditor may make all the necessary redemptions, although he has but one judgment. For the exercise of the right of redemption under a judgment does not satisfy it, nor impair its lien, nor in any way disqualify the plaintiff from subsequently exercising his rights of redemption.<sup>99</sup> If property is sold under a judgment for an amount insufficient to satisfy it, the lien of the judgment is removed from that property; so that the plaintiff cannot, except he has some other lien, redeem from the purchaser,<sup>100</sup> unless his right to do so has been affirmed by statute;<sup>101</sup> or, in other words, a judgment creditor cannot redeem from his own sale.<sup>102</sup> A judgment creditor who sells the land of his debtor, becoming himself the purchaser at an amount greater than his judgment, extinguishes the lien of his judgment, and has no right thereafter to redeem the premises from a sale thereof previous to that had under his judgment.<sup>103</sup> The right to redeem may also be lost through a levy upon personalty sufficient to satisfy the judgment, thereby extinguishing the judgment and destroying its lien.<sup>104</sup> This rule applies where several liens are foreclosed, and the premises directed to be sold,

<sup>97</sup> *Ex parte Peru Iron Co.*, 7 Cow. 540.

<sup>98</sup> *Hughes v. Helms* (Tenn. Ch.), 52 S. W. 460.

<sup>99</sup> *Ex parte Peru Iron Co.*, 7 Cow. 540.

<sup>100</sup> *People v. Fleming*, 2 N. Y. 484; *Russell v. Allen*, 10 Paige, 249; *Ex parte Paddock*, 4 Hill, 544.

<sup>101</sup> *Freeman v. Jordan*, 17 Ala. 500.

<sup>102</sup> *Clayton v. Ellis*, 50 Iowa, 590.

<sup>103</sup> *People v. Easton*, 2 Wend. 298.

<sup>104</sup> *Ex parte Lawrence*, 4 Cow. 417, 15 Am. Dec. 386.

and the proceeds applied to the discharge of such liens according to their respective priorities, as stated in the decree. It may be that the sale will leave some of the liens entirely unpaid. It is, nevertheless, a sale for the payment of such liens, and the holders of them have no right to redeem.<sup>105</sup> A party who, after foreclosure and sale under his mortgage, docketts a deficiency judgment, is not entitled by virtue of such judgment to redeem the premises sold from one who has properly redeemed it under a judgment lien from the purchaser at the foreclosure sale.<sup>106</sup> In Indiana, however, the decree of foreclosure, and the direction that the plaintiff may have execution for the deficiency, seem formerly to have been treated, for the purposes of redemption, as two independent judgments, and a sale under the former did not destroy plaintiff's right to redeem under the latter.<sup>107</sup> But later Indiana decisions, under changed statutes, have changed the doctrine in that state. The former rule is declared to have been of doubtful soundness even under then existing statutes, and to be entirely without force under the present ones.<sup>108</sup>

A judgment or mortgage creditor is not disqualified from redeeming because he has other securities adequate for the protection of his debt.<sup>109</sup> A mortgagee may redeem from a sale, whether made under execu-

<sup>105</sup> *Hayden v. Smith*, 58 Iowa, 285.

<sup>106</sup> *Black v. Gerichten*, 58 Cal. 56.

<sup>107</sup> *Greene v. Doane*, 57 Ind. 186; *Cummings v. Pottinger*, 83 Ind. 294.

<sup>108</sup> *Hervey v. Krost*, 116 Ind. 268; *Horn v. Indianapolis N. B.*, 125 Ind. 381, 21 Am. St. Rep. 231, and note. Compare *Porter v. Pittsburg S. Co.*, 122 U. S. 267, 281.

<sup>109</sup> *Muir v. Leitch*, 7 Barb. 341; *Fletcher v. Holmes*, 25 Ind. 458.



tion, or under a decree foreclosing another mortgage.<sup>110</sup> A mortgagee, although his mortgage may have been executed after the sale, has the right of redemption, provided his mortgage shall have been duly recorded within the period allowed for redemption.<sup>111</sup> The same rule applies to persons claiming the right to redeem by virtue of judgment liens. It is only requisite that the lien shall exist when redemption is sought to be made.<sup>112</sup> It is no valid objection that the holder of the mortgage debt acquired it by assignment,<sup>113</sup> or that the mortgage exists only for the purpose of securing a contingent liability.<sup>114</sup> In the absence of statutory provisions clearly conferring the power, it is held that one having a lien on part only of the land sold is not qualified to make any redemption thereof.<sup>115</sup> Where land of a husband in which his wife has an inchoate dower interest is sold upon a judgment against him, the wife has no right to redeem her husband's two-thirds interest in the land. The right of redemption is unnecessary to protect her interest therein.<sup>116</sup>

If a redemption made by a disqualified person is acquiesced in by the purchaser or other person from whom the redemption is made, it will estop such person, after he has received the redemption money, from

<sup>110</sup> *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149; *Gardner v. Emerson*, 40 Ill. 296; *Hasselman v. McKernan*, 1 L. & Eq. Reporter, 135.

<sup>111</sup> *Hervey v. Krost*, 116 Ind. 268.

<sup>112</sup> *Phillipps v. De Mass*, 14 Ill. 409; *Pollard v. Taylor*, 13 Ala. 604; *Van Rensselaer v. Sheriff*, 1 Cow. 501.

<sup>113</sup> *Bigelow v. Willson*, 1 Pick. 485.

<sup>114</sup> *Crossen v. White*, 19 Iowa, 109, 87 Am. Dec. 420. It was formerly essential, in New York, that the mortgage should have been given by the defendant. *Hodge v. Gallup*, 3 Denio, 527.

<sup>115</sup> *Erwin v. Schriver*, 19 Johns. 379; *Huntington v. Forkson*, 6 Hill, 149. But a different rule seems to have applied to the holders of mortgage liens. *Augur v. Winslow*, Clarke Ch. 258.

<sup>116</sup> *Buser v. Shepard*, 107 Ind. 417.

denying the validity of the redemption.<sup>117</sup> The act of redeeming should not, however, be confounded with the right to redeem or with the right to acquire a good title in pursuance of such redemption.<sup>118</sup>

One creditor may redeem from another.<sup>119</sup> If a sale is made under several judgments, no person can become a redemptioner who is not qualified to redeem as against all of the judgments.<sup>120</sup> Where land of a judgment debtor is sold under two successive executions upon different judgments, he is entitled to redeem from both sales at any time within the period of redemption set in motion by the first sale.<sup>121</sup> The lien of a judgment or decree of foreclosure of a mortgage dates from the execution of the mortgage. Therefore, where a right of redemption is given judgment creditors whose judgments are junior to that under which a sale was made, the holder of a judgment of foreclosure is not entitled to redeem from a sale of the mortgaged premises made under a judgment, which, although rendered prior to his judgment, is of a date subsequent to that of the execution of his mortgage.<sup>122</sup>

The right of redemption from an execution sale is not, strictly speaking, an estate, but is simply a

<sup>117</sup> *Stoddard v. Forbes*, 15 Iowa, 296; *Abadie v. Lobero*, 36 Cal. 390; *Meyer v. Mintonye*, 106 Ill. 414; *Smith v. Jackson*, 153 Ill. 399; *Pearson v. Pearson*, 131 Ill. 464; *Hervey v. Krost*, 116 Ind. 268.

<sup>118</sup> See post. § 321.

<sup>119</sup> *Tharp v. Forrest*, 76 Ia. 195; *Iverson v. Shorter*, 9 Ala. 713; *Karnes v. Lloyd*, 52 Ill. 113. Of the rights of senior judgment creditors to redeem from junior judgment creditors, and vice versa, see *Jackson v. Budd*, 7 Cow. 658; *People v. Fleming*, 2 N. Y. 484; *Ex parte Peru Iron Co.*, 7 Cow. 540; *Ex parte Ives*, 1 Hill, 639.

<sup>120</sup> *People v. Fleming*, 2 N. Y. 484.

<sup>121</sup> *Harrison v. Wilmering*, 72 Ia. 727.

<sup>122</sup> *Jarrell v. Brubaker*, 150 Ind. 260.

statutory right.<sup>123</sup> In Oregon, it is considered as something more than a privilege, as a right of property subject to bargain and sale.<sup>124</sup> A holder of a lien against land subordinate to a second lien under which a sale is had, by failing to redeem from such sale, loses his right to redeem the land from a subsequent sale under a first lien thereon.<sup>125</sup> A redemptioner having completed his redemption is regarded as a purchaser for value, and cannot be deprived of the rights thus acquired by one who, having lost his prior right of redemption, seeks to have the execution sale set aside and offers to refund the amount paid by him who made the redemption.<sup>126</sup> The right of redemption is an imperative incident to a sale of real property on execution. The fact of a sale being upon a creditors' bill does not change this rule, and a court cannot, by requiring real property which might have been seized and sold on an execution to be conveyed to a receiver, thereby take it out of the operation of the statute in relation to redemption.<sup>127</sup>

**§ 318. The Statutes Designating the Persons to Whom the money necessary to effect a redemption may be paid or tendered are by no means uniform in their provisions. Under most of these statutes, however, a redemption may be accomplished by making payment to**

<sup>123</sup> *Ewing v. Cook*, 85 Tenn. 332, 4 Am. St. Rep. 765, holding that the right cannot be reached and subjected to sale by a creditor's bill.

<sup>124</sup> *Rosenberg v. Croisan*, 18 Or. 470.

<sup>125</sup> *White v. Rathbone*, 73 Minn. 236.

<sup>126</sup> *White v. Leeds l. Co.*, 72 Minn. 352, 71 Am. St. Rep. 488.

<sup>127</sup> *Locey Coal Mines v. Chicago etc. C. Co.*, 131 Ill. 9.

the officer who made the sale,<sup>128</sup> or to his deputy,<sup>129</sup> or to an agent appointed by the officer for that purpose,<sup>130</sup> or to the officer's administrator.<sup>131</sup> In some states, payment may be made to the successor of the officer who made the sale.<sup>132</sup> In other states, it may be made to the clerk of the county,<sup>133</sup> or district court,<sup>134</sup> after tender to, and refusal by, the purchaser or personal representatives, or in case of nonresidence of such party or parties.<sup>135</sup> In Michigan, payment may be made to the register of deeds in whose office the certificate of sale is filed.<sup>136</sup> Redemption may be made of the purchaser if he continues to hold the certificate of purchase; but if his rights have been transferred to his assignee, or to a redemptioner, then the pay-

<sup>128</sup> *Elkin v. People*, 3 Scam. 207, 36 Am. Dec. 541; *Robertson v. Dennis*, 20 Ill. 313; *Mills' Ann. Stats. Colo.*, 1891, § 2547; *Cal. Code Civ. Proc.*, § 704; *Starr & Curtis' Ann. Ill. Stats.*, 1896, c. 77, § 18; *Howell's Ann. Stats. Mich.*, 1882, § 6121; *Stats. of Minn.*, 1894, § 5474; *Mont. Code Civ. Proc.*, § 1237; *Gen. Stats. Nev.*, 1888, § 3257; *Rev. Code N. D.*, 1895, § 5546; *Hill's Ann. Code of Or.*, 2d ed., § 302; *Rev. Stats. Utah*, 1898, § 3264; *Sanborn & Berryman Ann. Stats. Wis.*, § 3014.

<sup>129</sup> *Williams v. Lash*, 8 Minn. 498. Payment may be made to the deputy who conducted the sale, though the principal has since died. *People v. Baker*, 20 Wend. 602.

<sup>130</sup> *Hall v. Fisher*, 1 Barb. Ch. 53, 9 Barb. 17.

<sup>131</sup> *Stone v. Gardner*, 20 Ill. 804, 71 Am. Dec. 268.

<sup>132</sup> *Elkin v. People*, 3 Scam. 207, 36 Am. Dec. 541; *Robertson v. Dennis*, 20 Ill. 313; *Starr & Curtis's Ann. Ill. Stats.*, 1896, c. 77, § 18; *Mont. Code Civ. Proc.*, § 1237; *Gen. Stats. Nev.*, 1885, § 3257.

<sup>133</sup> *Lytle v. Etherly*, 10 Yerg. 389.

<sup>134</sup> *Armstrong v. Pierson*, 5 Iowa, 317; *Webb v. Watson*, 18 Iowa, 537; *Digest of Ark. Stats.*, 1894, § 3114; *Code of Iowa*, 1897, §§ 4051, 4056; *Ann. Ind. Stats.*, 1894, §§ 780, 784; *Gen. Stats. Kan.*, 1897, § 533; *Stats. Minn.*, 1894, § 5474; *Glaucque's Rev. Stats. Ohio*, 7th ed., § 5398 a; *Ballinger's Ann. Code & Stats. Wash.*, § 5295; *Comp. Stats. Neb.*, 1897, § 6088.

<sup>135</sup> *Ky. Stats.*, 1894, §§ 1684, 2364.

<sup>136</sup> *Howell's Ann. Stats. Mich.*, 1882, § 6121.

ment may be made to such assignee<sup>137</sup> or redemptioner.<sup>138</sup> Payment to a person not authorized to receive it does not effect a redemption,<sup>139</sup> and cannot be waived by the officer.<sup>140</sup> If the purchaser has died, the redemption money to which he is entitled should be paid to his personal representative, and not to his heirs.<sup>141</sup> Redemption from joint purchasers may be effected by a payment or tender to each one of his share of the price paid.<sup>142</sup> Where the title to premises sold is in a trustee, the propriety of a tender either to the trustee or to the beneficiary will depend upon circumstances. It would appear that, since the former holds the legal title, a tender to him would be more strictly proper.<sup>143</sup> But under special circumstances, as where the beneficiary has possession, and is receiving the rents and profits of the land, and has control of the title thereto, and the trustee is a nonresident without

<sup>137</sup> *Camp v. Simon*, 34 Ala. 126.

<sup>138</sup> *Ex parte Board*, 4 Cow. 420; *People v. Baker*, 20 Wend. 602. In most states the redemption money is primarily payable to the purchaser, his executors, administrators, successors, or assigns. Code of Ala., 1886, § 1881; Mills' Ann. Stats. Colo., 1891, § 2547; Cal. Code Civ. Proc., § 702; Starr & Curtis's Ann. Ill. Stats., 1896, c. 77, § 18; Ky. Stats., 1894, §§ 1684, 2364; Pub. Stats. Mass., 1882, p. 1012, § 32, p. 1014, § 44; Howell's Ann. Stats. Mich., 1882, § 6121; Stats. of Minn., 1894, § 5474; Mont. Code Civ. Proc., § 1237; Nev. Gen. Stats., 1885, § 3257; N. Y. Code Civ. Proc., 1895, § 1446; Rev. Code N. D., § 5546; Code of Tenn., 1884, § 2949; Rev. Stats. Utah, 1898, § 3264; Sanborn & Berryman Ann. Stats. Wis., § 3014.

<sup>139</sup> *People v. Rathburn*, 15 N. Y. 528; *Griffin v. Chase*, 23 Barb. 278.

<sup>140</sup> *Little v. People*, 43 Ill. 188.

<sup>141</sup> *Campbell v. Campbell*, 3 Head, 325. The place where redemption must or may be made has not, so far as we are aware, been specially designated by statute, except in New York. In that state, if the redemption is sought to be effected on the last day, it must be made at the sheriff's office. *Gilchrist v. Comfort*, 34 N. Y. 235.

<sup>142</sup> *Polk v. Mitchell*, 85 Tenn. 634.

<sup>143</sup> *Barringer v. Burke*, 21 Ala. 765.

any interest in the land, tender for the purposes of redemption may with propriety be made to the beneficiary.<sup>144</sup> A person seeking to redeem is justified in making tender to the purchaser instead of his alienee where such redemptioner has no notice, either actual or constructive, that the purchaser has divested himself of title.<sup>145</sup>

**§ 319. Presenting Evidence of Right to Redeem.—**Usually, the person seeking to make a redemption, unless he is the defendant in execution, is required to present some evidence of his right to redeem. Statutes directed to this matter usually require a redemptioner to produce to the person from whom he seeks to redeem, 1, a certified copy of his judgment or of the record of the mortgage or other lien under which he claims; 2, a verified copy of any assignment necessary to establish his claim; and 3, an affidavit as to the amount due him.<sup>146</sup> If redemption is sought to be made by an executor or administrator, he may be required to file, in addition to the ordinary evidence, a sworn copy of his letters testamentary or of administration.<sup>147</sup> Where a redemptioner is required to give notice of his intention to redeem, he must furnish evidence that he has complied with the statutory requirement in that regard.<sup>148</sup> The Wisconsin statute requires that the stat-

<sup>144</sup> *Couthway v. Berghaus*, 25 Ala. 393.

<sup>145</sup> *Lehman v. Collins*, 69 Ala. 127.

<sup>146</sup> Cal. Code Civ. Proc., 1895, § 705; Howell's Ann. Stats. Mich., 1882, § 6136; Stats. Minn., 1894, § 5474; Mont. Code Civ. Proc., 1895, § 1237; Gen. Stats. Nev., 1885, § 3258; N. Y. Code Civ. Proc., 1895, § 1464; Rev. Code N. D. 1895, § 5547; Hill's Code of Or., 2d ed., § 305; Rev. Stats. Utah, 1898, § 3265; Sanborn & Berryman Ann. Stats. Wis., § 3015.

<sup>147</sup> N. Y. Code Civ. Proc., 1895, § 1466; Sanborn & Berryman Ann. Stats. Wis., § 3105.

<sup>148</sup> Hill's Ann. Code of Or., 2d ed., § 305.

utory evidence shall be filed with the register of deeds within three days after redemption is made.<sup>149</sup> The presentation of this evidence cannot be waived by the officer;<sup>150</sup> but it has been held that he may first receive the money and allow the evidence of the right to redeem to be shown to him afterward.<sup>151</sup> The purchaser may waive the production of evidence,<sup>152</sup> and is deemed to have done so when he accepts the redemption money without objection.<sup>153</sup> Where the person entitled to resist the redemption does not waive his right to interpose objections, the evidence of the redemptioner's right must be presented in the form and method prescribed by statute; otherwise, the redemption will be void.<sup>154</sup>

<sup>149</sup> Sanborn & Berryman Ann. Stats. Wis., § 3015.

<sup>150</sup> Waller v. Harris, 20 Wend. 555, 32 Am. Dec. 590; People v. Sheriff of Broome, 19 Wend. 87; People v. Covell, 18 Wend. 598.

<sup>151</sup> People v. Ransom, 2 Hill, 51; Ex parte Board, 4 Cow. 420.

<sup>152</sup> People v. Fralick, 12 Mich. 234.

<sup>153</sup> Bank of Vergennes v. Warren, 7 Hill, 91; Wood v. Morehouse, 45 N. Y. 369.

<sup>154</sup> If the statute requires a copy of the docket to be shown, a copy of the judgment will not suffice. Haskell v. Manlove, 14 Cal. 54. A statute providing for the production of a copy of the judgment is not satisfied by delivering a copy of the execution. Waller v. Harris, 20 Wend. 555, 32 Am. Dec. 590. A redemption made without delivering to the sheriff an execution on the judgment is void in Illinois. Stone v. Gardiner, 20 Ill. 304. If the redemptioner claims to be the assignee of a judgment or mortgage, evidence of the assignment, authenticated as prescribed by statute, must be produced. Williams v. Lash, 8 Minn. 496; Hall v. Thomas, 27 Barb. 55; People v. Fleming, 4 Denio, 137. If an affidavit of the amount due to the redemptioner is required, such affidavit must be explicit (People v. Becker, 20 N. Y. 354); must not overestimate the amount (Smith v. Miller, 25 N. Y. 619); and if made by an agent, must state in express terms the facts of agency, the means and extent of his knowledge, and be positive as to the amount due (Ex parte Bank of Monroe, 7 Hill, 177, 42 Am. Dec. 61; Ex parte Shumway, 4 Denio, 258). Production by a redemptioner, of a sheriff's certificate of sale under redemptioner's judgment may take the place of

**§ 320.** The Amount Required to Redeem Property from an execution sale differs in the different states. In all, the payment of the sum bid, together with a specified percentage in addition thereto, is exacted. The holder of the certificate is also entitled to be reimbursed for such taxes as he may have necessarily paid. In Arkansas, taxes paid by the purchaser need not be repaid to effect a redemption. The statute of that state declares that the defendant may redeem by paying the purchase-money, with fifteen per cent per annum, "and all lawful charges." The terms "all lawful charges" signify "the costs of the clerk connected with the act of redeeming, and do not include taxes."<sup>155</sup> The phrase "lawful charges," as used in the Alabama statute, is construed not to include any claim or demand held by the purchaser except such as may be in the nature of a lien or encumbrance on the land, and, therefore, as not to include insurance paid by the purchaser nor the amount of a justice's judgment held by him which had not, by the issue and levy of execution, become a lien on the land.<sup>156</sup> In Massachusetts, the person redeeming must pay the amount of the bid, with interest thereon, and all lawful taxes and assessments, and such reasonable expenses as have been incurred in necessary repairs; but he is entitled to a deduction for the value of the rents and profits.<sup>157</sup> In no case can a redemption be made by paying a less

a production of the judgment, or docket thereof, or execution, required by statute, where such certificate is, by statute, made prima facie evidence of the facts therein stated, and does in fact recite the entry and docketing of the judgment and the issuance of execution. *Ritchie v. Ege*, 58 Minn. 291.

<sup>155</sup> *Fuller v. Evatt*, 42 Ark. 230.

<sup>156</sup> *Richardson v. Dunn*, 79 Ala. 167; *Parmer v. Parmer*, 74 Ala. 285.

<sup>157</sup> *Norton v. Babcock*, 2 Met. 518.



sum than that paid by the purchaser. An owner of land seeking to redeem must reimburse the holder of the certificate of purchase for the amount paid therefor, and, in addition, for the expense which such holder was obliged to undergo in making another redemption of the premises.<sup>158</sup> Hence, if property is sold under several judgments for one sum, a redemptioner cannot redeem by paying the amount of those judgments which, as liens, were paramount to his own.<sup>159</sup> A judgment debtor may redeem from the purchaser by paying the amount of the bid, percentage, and taxes. He need not first pay other liens held by the purchaser.<sup>160</sup> If a person other than the judgment debtor seeks to redeem from the purchaser, or from a redemptioner, he must pay all liens of the holder of the certificate of purchase paramount to the lien under which the redemption is sought to be made.<sup>161</sup> A judgment creditor seeking to redeem his debtor's land need not pay an unregistered mortgage thereon given by the debtor subsequent to the sale.<sup>162</sup> Where property had been struck off at an inadequate price, but, the sale not being completed, a second sale was held and completed at a higher price, it was held that the amount payable on redemption should be based upon the bid at the final sale.<sup>163</sup> Where land is sold first on a junior, and later on a senior judgment, a junior lienholder seeking to redeem

<sup>158</sup> *Boggs v. Douglass*, 89 Iowa, 150.

<sup>159</sup> *Silliman v. Wing*, 7 Hill, 159; *Barker v. Gates*, 1 How. Pr. 77.

<sup>160</sup> *Sharp v. Miller*, 47 Cal. 82; *Campbell v. Oaks*, 68 Cal. 222.

<sup>161</sup> *People v. Ransom*, 2 Hill, 51; *Knight v. Fair*, 9 Cal. 117; *Warren v. Fish*, 7 Minn. 432; *Vandyke v. Herman*, 3 Cal. 295. Junior liens need not be paid. *Rosekrans v. Hughson*, 1 Cow. 428.

<sup>162</sup> *Polk v. Mitchell*, 85 Tenn. 634.

<sup>163</sup> *Maher v. Aetna L. I. Co.*, 116 Ind. 486, 9 Am. St. Rep. 880.

from the second sale need only pay the amount for which such sale was made, with interest.<sup>164</sup>

Each parcel separately sold may be separately redeemed.<sup>165</sup> But if several parcels are sold together, or if only one parcel is sold, and the redemptioner owns only a part thereof, still the purchaser cannot be compelled to accept anything less than the whole amount of his bid, and the percentage thereon.<sup>166</sup> It is equally true that where lands have been sold en masse, a judgment creditor seeking to redeem must cause them to be sold en masse under his execution. If he makes his sale otherwise, he will be deemed to have abandoned his redemption.<sup>167</sup>

If property which belongs to two or more persons as tenants in common is sold under a judgment against them, there is no doubt that no redemption of the interest of either can be made without paying the whole purchase price.<sup>168</sup> If one who is entitled to redeem as a junior lienholder does not take the steps required by law for redeeming, but merely procures an assignment of the certificate of purchase, a redemption may be made without paying off his lien. To entitle him to tack the amount of his lien to the amount bid at the sale, he must comply with the statute as a redemptioner.<sup>169</sup>

<sup>164</sup> *Abraham v. Halloway*, 41 Minn. 156.

<sup>165</sup> *Dickenson v. Gilliland*, 1 Cow. 481; *Robertson v. Dennis*, 20 Ill. 313.

<sup>166</sup> *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. Rep. 231; *Cross v. Weare*, 62 N. H. 125; *Hawkins v. Vineyard*, 14 Ill. 26, 56 Am. Dec. 487; *Atherton v. Jones*, 1 N. H. 363; *Bond v. Bond*, 2 Pick. 382; *Foss v. Stickney*, 5 Greenl. 390; *Freeman on Cotenancy and Partition*, §§ 176, 371.

<sup>167</sup> *Oliver v. Croswell*, 42 Ill. 41; *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. Rep. 231.

<sup>168</sup> *Durley v. Davis*, 69 Ill. 133.

<sup>169</sup> *Pamperin v. Scanlan*, 28 Minn. 345; *Moore v. Hopkins*, 93 Ill.

Redemption must be made in money. It may, in the absence of statutes to the contrary, be made in greenbacks, or any other legal tender.<sup>170</sup> It cannot be made in ordinary nor in certified bank checks,<sup>171</sup> nor in certificates of deposit.<sup>172</sup> But if the officer to whom redemption is required to be made receives the notes of national banks, treats and receipts for them as money, and holds himself ready to pay, and offers to pay, the amount thereof in lawful legal tender, it has been held that the redemption is good.<sup>173</sup> Such officer is deemed to be so far the agent of the person from whom redemption is sought to be made that he may waive the latter's right to object to a tender or payment by the redemptioner, part of which is in national bank notes, or paper currency.<sup>174</sup> Redemption might formerly, in New York, be made in current bank bills.<sup>175</sup> The purchaser may, however, accept redemption in any mode of payment satisfactory to him.<sup>176</sup> If the sum paid is too little, the redemption is void,<sup>177</sup> unless the deficiency is too trifling to be worthy of consideration,<sup>178</sup>

505; *Parke v. Hush*, 29 Minn. 434. In Iowa, the rule is otherwise. In that state a junior creditor, who procures an assignment of the certificate of purchase, is entitled to the benefits of a redemptioner. Redemption from him cannot be made without paying the amount of a lien held by him, and paramount to that under which the redemption is sought to be made. *Goode v. Cummings*, 35 Iowa, 67.

<sup>170</sup> *People v. Mayhew*, 26 Cal. 655.

<sup>171</sup> *Lyttle v. Etherly*, 10 Yerg. 389; *Thorne v. San Francisco*, 4 Cal. 127.

<sup>172</sup> *Dougherty v. Hughes*, 3 G. Greene, 92.

<sup>173</sup> *Boyd v. Olvey*, 82 Ind. 294; *Buford v. Henzler*, 8 Biss. 177.

<sup>174</sup> *Rogers v. Rogers* (Tenn. Oh.), 35 S. W. 890; *Ritchie v. Roe*, 58 Minn. 291. Compare *Nopson v. Horton*, 20 Minn. 268.

<sup>175</sup> *Hall v. Fisher*, 9 Barb. 17; *Ex parte Board*, 4 Cow. 420.

<sup>176</sup> *Stone v. Smith*, 2 How. Pr. 117.

<sup>177</sup> *Dickenson v. Gilliland*, 1 Cow. 481; *Hall v. Fisher*, 1 Barb. Ch. 53.

<sup>178</sup> *Ex parte Becker*, 4 Hill, 613.

or the sum paid is accepted by the holder of the certificate of purchase without objection.<sup>179</sup> The payment of too much by a redeeming creditor does not avoid the redemption.<sup>180</sup> A purchaser cannot compel the defendant to pay a debt which has been assigned to the former by an assignor who has not redeemed.<sup>181</sup> A tender in bank notes is good, if not objected to on that account.<sup>182</sup>

§ 321. **The Effect of a Redemption.**—In some of the states, the purchaser at an execution sale is, upon payment of the amount of his bid, entitled to an immediate conveyance of the property. By such conveyance he is at once invested with the legal title, and continues so invested until he makes a reconveyance to the defendant. Where this rule prevails, the defendant, in case the purchaser refuses to receive the redemption money, or to reconvey the title, is obliged to resort to a bill to redeem in order to enforce his rights, and become reinvested with the legal title to his property.<sup>183</sup> In Oregon, the purchaser is at once entitled to the possession of the property sold; and may use it in the manner in which property of like character is ordinarily used. But if redemption is made, he must restore the property to its original condition. If there was a crop growing on the land, sown by the judgment debtor, and of which the purchaser had taken possession, the latter must surrender it to the

<sup>179</sup> *Karnes v. Lloyd*, 52 Ill. 118.

<sup>180</sup> *Beekman v. Bunn*, Hill & D. 265; *Symonds v. Peck*, 10 How. Pr. 395; *Neillson v. Neilson*, 5 Barb. 565.

<sup>181</sup> *Farnsworth v. Howard*, 1 Cold. 215.

<sup>182</sup> *Lowry v. McGhee*, 8 Yerg. 242; *Ritchie v. Roe*, 58 Minn. 291.

<sup>183</sup> *Paris v. Burger*, 4 Humph. 325; *Hawkins v. Jamison*, Mart. & Y. 83; *Mitchell v. Brown*, 6 Cold. 505; *Pillow v. Langtree*, 5 Humph. 389; *Burk v. Bank of Tenn.*, 3 Head, 686.

former if a redemption is made.<sup>184</sup> In a majority of the states, no valid conveyance can be made until after the expiration of the time allowed to redeem. In these states, a redemption accomplished by the judgment debtor, or his grantee, has the effect of extinguishing the rights of the purchaser, and of releasing the defendant's title from the consequences of the sale, but leaving it subject to all other valid rights and liens.<sup>185</sup>

A redemption by a judgment lienholder from a sale under a senior judgment passes title free from the lien of a judgment which, though senior to that of the redemptioner, is junior to that under which the sale was made.<sup>186</sup>

The sale being made to satisfy the judgment lien, that lien is removed from the property, and cannot be used to support a redemption made by the judgment creditor from his own sale, under the claim that he is a lienholder.<sup>187</sup> But a redemption having been effected, does it restore this lien which had been removed by the sale? In Oregon it does, even where the redemption is made by a grantee of the judgment debtor; and, hence, the title of such grantee may be swept away by a sale for the balance remaining unpaid on the original judgment.<sup>188</sup> An opposite conclusion

<sup>184</sup> *Cartwright v. Savage*, 5 Or. 397.

<sup>185</sup> *Phyfe v. Riley*, 15 Wend. 248, 30 Am. Dec. 55; *Warren v. Fish*, 7 Minn. 432; *Bodine v. Moore*, 18 N. Y. 347; *Boyce v. Wight*, 2 Abb. N. C. 163.

<sup>186</sup> *Boggs v. Douglas*, 89 Iowa, 150.

<sup>187</sup> Ante, § 317.

<sup>188</sup> *Settlemyre v. Newsome*, 10 Or. 446. In *Flanders v. Aumack*, 32 Or. 19, 67 Am. St. Rep. 504, the Oregon doctrine, as stated, was reaffirmed and adhered to in a carefully considered opinion. Having stated that "the authorities are practically uniform that a redemption by the judgment debtor of his lands sold under execution will reinstate the lien of the judgment for any balance remaining unpaid, and subject the lands to a resale to satisfy such balance."

has been reached in Iowa, where the court held, with good reason, that there is a distinction between redemption by the judgment debtor and redemption by his grantee as far as the right of the judgment creditors to resell for an unpaid portion of a mortgage debt is concerned, and that to allow a resale as against the grantee of the judgment debtor would be for the court to lend itself to a scheme designed to sacrifice the judgment debtor's property.<sup>189</sup> The lien seems also to be regarded as restored in some of the other states, or, rather, they treat it as having never been lost, arguing that it cannot be removed by a sale which never operated to divest defendant's title.<sup>190</sup> In our judgment,

the court denied the existence of any distinction between the rights of a judgment debtor redeeming and those of his successor in interest, and continued: "The effect of a sale under execution is to suspend, but not to divest the lien of the judgment, as it suspends all subsequent liens until redemption is made, but a sheriff's deed cuts them off altogether. During the interim between the sale and the deed the rights of the parties interested are measured by the statute. The sale is inchoate, and does not transfer the title until consummated by the execution and delivery of the deed in due course of law. If subsequent lienors, whether by judgment, decree, or mortgage, redeem, the course of the sale is not thereby impeded or precluded, but finally culminates in a deed as if no redemption was had by any one, and the deed puts an end to the lien of the judgment or decree under which the sale was made and all other liens subsequently acquired. But a redemption by the judgment debtor has a very different effect. It terminates the sale, and restores the estate. The sheriff's duties are at an end, and he can proceed no further. . . . The lien of the judgment under which the sale proceeded, if only partially satisfied, is not divested or eradicated, but is simply suspended, as are the liens of all creditors having subsequent judgments, decrees, or mortgages pending the sale. If the sale is perfected, either to the purchaser or through the redemption by subsequent lienors, they are all swept away; but, if redemption is had by the judgment debtor or his successor, they all survive or are reinstated as though no sale had been had."

<sup>189</sup> Harms v. Palmer, 73 Iowa, 446, 5 Am. St. Rep. 691.

<sup>190</sup> State v. Sherill, 34 Ind. 57; Allen v. McGaughey, 31 Ark. 252.

the better rule is that the lien is removed by the sale, and that on a redemption being made, while it may attach as to newly acquired property, it is not restored as of its original date.<sup>191</sup> If the redemption is made by a creditor of the judgment debtor, it generally operates as a transfer to such creditor of the purchaser's rights in the property, and entitles him to a conveyance, if no redemption is made from him in the time and mode authorized by law. But the redemption may be made by a creditor having a lien against one only of several judgment debtors whose lands have been sold. To make redemption he must pay the whole amount due, for he cannot compel the purchaser to accept a partial redemption. Does his redemption operate to vest him with the rights of a redemptioner not only against his debtor, but also against the other defendants, against whom and whose land he has no claim whatsoever? A majority of the authorities affirms that it does not, and that, if a deed is made to him pursuant to his redemption, it conveys to him only the title of the defendant against whom he held a lien.<sup>192</sup>

In California, the rule has been announced that the redemption by a judgment creditor of one cotenant entitled such creditor to a conveyance of the property of all. The absurdity of this proposition seems manifest to us from the results to which it necessarily leads. The redemptioner in such case has no lien against the property of but one of the cotenants, and, therefore, no right to make the moiety of the others answerable for his debt. But if the redemption is effectual to en-

*Hervey v. Krost*, 116 Ind. 268; *Green v. Stobo*, 118 Ind. 332; *Campbell v. Maginnis*, 70 Iowa, 589; *Seaman v. Galliga*, 8 S. D. 277.

<sup>191</sup> *Clayton v. Ellis*, 50 Iowa, 590; *Wood v. Colvin*, 5 Hill, 228.

<sup>192</sup> *Fischer v. Eslaman*, 68 Ill. 78; *Neilson v. Neilson*, 5 Barb. 565; *Erwin v. Schriver*, 19 Johns. 379.

title the redemptioner to a conveyance of the whole estate, then the cotenants, against whom the redemptioner had no claim, must pay his lien in order to free their property from his redemption. The moiety of the cotenant against whom the redemption was made may have been altogether insufficient in value to pay the claim of the redemptioner. But by his redemption he extends his lien over the property of the others against their wish, and makes an inadequate security abundantly sufficient to answer his demand.<sup>193</sup>

In Indiana, a redemption by a mortgagor or judgment creditor does not operate as an assignment of the certificate of purchase, nor entitle the redemptioner to a conveyance. The title of the judgment debtor is thereby freed from the sale, and subjected to a lien in favor of the redemptioner for the amount paid by him. The latter obtains no title to the premises, nor any right to their possession, unless as the result of their sale in some proceeding to enforce his lien.<sup>194</sup> If from any cause the sale was void, the redemptioner acquires no title, for his rights, like the purchaser's, are dependent upon a valid judgment and sale.<sup>195</sup> We have said already that redemption may be made by a disqualified person, if the person from whom it is made consents and accepts payment of the redemption money. Upon principles of estoppel, the latter person will be precluded from thereafter questioning the redemption. But "it does not at all follow that because a redemption in fact has been effected, the redeeming creditor

<sup>193</sup> *Eldridge v. Wright*, 55 Cal. 531; 13 Chic. L. N. 86.

<sup>194</sup> *Rice v. Puett*, 81 Ind. 230.

<sup>195</sup> *Mulvey v. Carpenter*, 78 Ill. 580; *Johnson v. Baker*, 38 Ill. 99, 87 Am. Dec. 293; *Keeling v. Heard*, 3 Head, 592; *Ferguson v. Quinn*, 123 Pa. St. 337.



will necessarily get a good title to the land redeemed. That depends upon other considerations. To insure a good title there must not only be the payment of the redemption money, but also a proper levy and sale of the premises, under a valid execution, followed by a sheriff's deed executed in conformity with the statute."<sup>196</sup> Estoppel to question a redemption, while binding upon the creditor who accepts the redemption, cannot bind third persons not in privity with him and not parties to the transaction.<sup>197</sup> A person entitled to redeem does not effect a redemption by merely procuring an assignment of the certificate of sale, where a certificate of redemption and a proper recording thereof are required by statute.<sup>198</sup> If, however, a redemption has been otherwise properly completed by one entitled to redeem, a refusal on the part of the sheriff to issue a certificate of redemption is deemed immaterial.<sup>199</sup>

The redemptioner is not, any more than the purchaser, responsible for mere errors in the proceedings.<sup>200</sup> Nor will his redemption become inoperative through the subsequent reversal of his judgment.<sup>201</sup> An irregular redemption, as one prematurely made by one later entitled to redeem, or one made by a judgment creditor after the assignment of his judgment,

<sup>196</sup> *Meyer v. Mintonye*, 106 Ill. 414; *Smith v. Jackson*, 153 Ill. 399.

<sup>197</sup> *Jarell v. Brubaker*, 150 Ind. 260.

<sup>198</sup> *Boynton v. Pierce*, 151 Ill. 197; *McRoberts v. Conover*, 71 Ill. 524; *Keller v. Coman*, 151 Ill. 197, where the rule was adhered to, although the assignment of the certificate of sale was regularly recorded and expressed to be "for the purpose of canceling said certificate and satisfying the decree of sale."

<sup>199</sup> *Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369.

<sup>200</sup> *Pekin M. Co. v. Kennedy*, 81 Cal. 356; *Ahern v. Freeman*, 46 Minn. 156, 24 Am. St. Rep. 206. Compare *Moore v. Duffy*, 74 Hun, 78.

<sup>201</sup> *McLagan v. Brown*, 11 Ill. 519.

becomes valid and effectual as against persons entitled to redeem therefrom who allow their redemption period to expire without attempting to redeem from, or to avoid, the redemption made.<sup>202</sup> The fact of redemption by a creditor, and of his acquisition of valuable property thereby, does not release or otherwise impair the judgment or other obligation by virtue of which he was qualified to redeem.<sup>203</sup> The effect of a redemption cannot be destroyed by showing that the money paid was advanced to the redemptioner by some third person. It is immaterial where the money comes from.<sup>204</sup> A redemption once consummated cannot be recalled.<sup>205</sup> The offer or tender of the money is, if refused, equivalent to a redemption; and the sheriff's authority to convey the property to the purchaser ter-

<sup>202</sup> *Rush v. Mitchell*, 71 Ia. 333; *Sprandel v. Houde*, 54 Minn. 308.

<sup>203</sup> *Emmet v. Bradstreet*, 20 Wend. 50; *Van Horne v. McLaren*, 8 Paige, 285, 35 Am. Dec. 685.

<sup>204</sup> *Seale v. Doane*, 17 Cal. 476.

<sup>205</sup> *American Ex. Bank v. M. C. & B. Co.*, 6 Hill, 362. The case of *Wilkins v. Willson*, 51 Cal. 212, is opposed to the rule here stated. In this case, money had been deposited to effect a redemption. Subsequently, a deed was executed by the sheriff, and thereafter the redemption money was withdrawn. The court said: "Conceding that the deposit of the redemption money in the hands of the sheriff, by Wade, defeated the authority of the sheriff to deliver the deed to Wilson, Wade's subsequent withdrawal of the redemption money operated as to Wade, and as to the appellant, claiming through him by subsequent conveyance, to restore the necessary authority to the sheriff, and to ratify the precedent delivery of the deed by the latter. In delivering the deed, the sheriff acted as the agent of Wade, the execution defendant, and a present want of authority might, as in other cases, be supplied by the subsequent ratification of the principal. Wade, or his grantee, cannot, in view of the subsequent withdrawal of the redemption money (even though accompanying it with the protest which he made) come now to say that the sheriff had not the requisite authority to deliver the deed, and by this means not only appropriate the redemption money, but retain the land also."

minates.<sup>206</sup> A redemption can affect only the interest which the redemptioner was entitled to redeem. Hence, if the redemptioner is a part owner, or is entitled to redeem because he has a lien against a part owner, his redemption does not release the interest of the other part owners, although he is compelled to pay the full amount of the purchaser's bid, and the percentage allowed thereon by law.<sup>207</sup> Defendant is not, after redeeming, entitled to recover of the purchaser for rents while the latter was in possession.<sup>208</sup>

§ 322. **Bills to Redeem.**—A judgment debtor, or other person entitled to redeem, may find it necessary to resort to equity for the protection or enforcement of his rights. Where a deed has been given, which is defeasible upon payment of the redemption money, the defendant may, in equity, after a tender has been made and refused, compel a reconveyance.<sup>209</sup> Even where the form of procedure is such that no deed is given before the termination of the period allowed for redemption, a bill to redeem may be sustained if it contains an offer to pay the sum due.<sup>210</sup> Redemption may

<sup>206</sup> *Hershey v. Dennis*, 53 Cal. 77; *Jonsen v. Nabring*, 50 Ala. 392; *Searcey v. Oates*, 68 Ala. 111; *Hutchings v. Munger*, 41 N. Y. 155.

<sup>207</sup> *Neillson v. Neillson*, 5 Barb. 565; *Quinn v. Kenney*, 47 Cal. 147; *Freeman on Cotenancy and Partition*, §§ 176, 371.

<sup>208</sup> *Kannon v. Pillow*, 7 Humph. 281.

<sup>209</sup> *Moore v. Gore*, 35 Ala. 701; *Walker v. Ball*, 39 Ala. 301.

<sup>210</sup> *Kemp v. Mitchell*, 36 Ind. 249; *Simmons v. Marable*, 11 Humph. 436; *Jones v. Planters' Bank*, 5 Humph. 619, 42 Am. Dec. 471; *Walker v. Brown*, 45 Miss. 615; *Lock v. Edmundson*, 1 Baxt. 282; *Ewing v. Cook*, 85 Tenn. 332, 4 Am. St. Rep. 765. A bill may, in California, be sustained by a mortgagee to redeem from a prior mortgage (*Daubenspeck v. Platt*, 22 Cal. 330), or from a foreclosure sale under a decree to which he was not a party. *Siter v. Jewett*, 33 Cal. 92. In Wisconsin a mortgagee may sustain a bill to redeem from a sale made en masse. *Raymond v. Pauli*, 2 Wis. 531.

be enforced by a bill brought by an equitable owner who, having made the proper tender to those holding under an execution sale, before the expiration of the redemption period, has acquired thereby a superior equity.<sup>211</sup> Payment into court of the amount required to redeem, while proper, is not prerequisite if the complainant keeps the tender good and stands ready to pay the same into court when ordered to do so.<sup>212</sup> As to the averments necessary in order to obtain relief by a bill to redeem, it may be said, in general, that a complainant must aver performance of the statutory conditions entitling him to equitable relief. He must show that he has exhausted his legal remedies by attempting to exercise his right of redemption in the statutory mode. Therefore, he must aver that he has paid or tendered the redemption money to the person authorized to receive it, or must bring the money into court, and offer to pay the amount requisite for redemption.<sup>213</sup> Possession by plaintiff of the lands sought to be redeemed is not prerequisite to the maintenance of a bill to redeem.<sup>214</sup> Under a statute making it a condition precedent to redemption that the debtor deliver possession of the premises within ten days after a sale thereof, a bill to redeem brought by such debtor must aver a compliance with this requirement.<sup>215</sup>

A bill may be sustained to redeem after the expiration of the time allowed by law, if it shows the exist-

<sup>211</sup> *Merrill v. Everett*, 83 Me. 290.

<sup>212</sup> *Ritchie v. Ege*, 58 Minn. 291; see *Hyman v. Bogue*, 135 Ill. 9; *Morrill v. Everett*, 83 Me. 290.

<sup>213</sup> *Paulling v. Meade*, 23 Ala. 505; *Stocks v. Young*, 67 Ala. 341; *Hyman v. Bogue*, 135 Ill. 9; compare *Rogers v. Tindall*, 99 Tenn. 356.

<sup>214</sup> *Morrill v. Everett*, 83 Me. 290.

<sup>215</sup> *Paulling v. Meade*, 23 Ala. 505; *Stocks v. Young*, 67 Ala. 341; *Sanford v. Ochitaloni*, 23 Ala. 669; compare *Richardson v. Dunn*, 79 Ala. 167; *Aycock v. Adler*, 87 Ala. 190.

ence of fraud, mistake, or surprise sufficient to induce the action of a court of equity.<sup>216</sup> The lands of a non-resident were sold May 23, 1874, but payment was not in fact made until September 12th of the same year. The sheriff by mistake returned the process with a statement that the lands had been sold on the last-named day instead of the former. The agent of the owner, hearing of the sale, went to the clerk's office to ascertain when it had taken place, and was misled by the sheriff's return and on that account permitted the time for redemption to pass. The bill was then filed to redeem, and the relief prayed for was granted, on the ground that the case was "fairly within the principle of accident as known to the law."<sup>217</sup> Expiration of the period of redemption is ordinarily a good defense to a bill to redeem, and equity will not extend the period unless for good cause shown. In no case will equity grant relief where a plaintiff has, through laches, allowed the period to run before seeking to redeem.<sup>218</sup> The title of the execution debtor is not properly triable on a bill to redeem.<sup>219</sup>

§ 323. The Title of the Purchaser and of the Judgment Debtor before the Redemption Right is Lost.—In a few of the states the purchaser at an execution sale is immediately entitled to a conveyance from the officer making the sale, the effect of which is to vest him with the legal title, subject to the defendant's statutory right of redemption.<sup>220</sup> Where the purchaser is not

<sup>216</sup> *Vallandigham v. Washington*, 85 Ky. 83.

<sup>217</sup> *Alexander v. Bailey*, 2 Lea, 636.

<sup>218</sup> *Etlenhelmer v. Northgraves*, 75 Ia. 28; *Salsbury v. Black*, 119 Pa. St. 200, 4 Am. St. Rep. 631.

<sup>219</sup> *Aycock v. Adler*, 87 Ala. 190.

<sup>220</sup> *Searcey v. Oates*, 68 Ala. 111.

entitled to an immediate conveyance, his title or interest, and that of the defendant in execution, during the time that the former is entitled to redeem, are difficult to describe, though they are no doubt well understood. It is certain that prior to the execution of the sheriff's deed the purchaser has no title in the lands purchased. He cannot recover possession nor can he, unless expressly authorized by statute, maintain any action for rents and profits.<sup>221</sup> But he has such a right in the premises that he may question the right of a creditor of the defendant to redeem.<sup>222</sup> Frequently his interest is spoken of as that of a mere lienholder.<sup>223</sup> He may, during the period allowed for redemption, pay off a superior lien on the land and be subrogated thereto.<sup>224</sup> "The purchaser, prior to the execution of the sheriff's deed, holds merely a lien upon the land, differing from the lien of the judgment in this, that it is more specific, and may continue after that of the judgment has expired and that the lien is much nearer a complete enforcement than that of the judgment—the single act of the execution and delivery of the sheriff's deed being required."<sup>225</sup> But the interest of the purchaser is certainly something more than a lien. It seems more like an inchoate title than like a lien; and it is generally, for the purposes both of voluntary and involuntary transfer, treated like real estate.<sup>226</sup> If the title of a purchaser at an execution

<sup>221</sup> *Evertsen v. Sawyer*, 2 Wend. 507; *Bissell v. Payn*, 20 Johns. 8; *Garrett v. Dewart*, 43 Pa. St. 342, 82 Am. Dec. 570.

<sup>222</sup> *Robertson v. Moline M. & S. Co.*, 88 Ia. 463.

<sup>223</sup> *Swain v. Stockton Sav. etc. Soc.*, 78 Cal. 600, 12 Am. St. Rep. 118; *Vaughn v. Ely*, 4 Barb. 159; *Ex parte Peru Iron Co.*, 7 Cow. 540.

<sup>224</sup> *Swain v. Stockton Sav. etc. Soc.*, 78 Cal. 600, 12 Am. St. Rep. 118.

<sup>225</sup> *People v. Mayhew*, 26 Cal. 660; *Baber v. McLellan*, 30 Cal. 135.

<sup>226</sup> *Page v. Rogers*, 31 Cal. 293; *N. Y. L. I. & T. Co. v. Bailey*, 3

sale is not perfect until confirmation of the sale, where confirmation is entered and later set aside in the same term, a vendee of the purchaser, by transfer subsequent to the setting aside of the confirmation, takes no title.<sup>227</sup> And while the purchaser has something more than a mere lien, the judgment debtor, until after the expiration of the time to redeem, has an interest different from and superior to a mere right or equity of redemption. He is the holder of the legal title, and must in all respects be treated as the owner of the land, even after he has lost his right of redemption, unless a deed has been executed in pursuance of the sale. "To speak of his right as a mere right to redeem is consequently incorrect and misleading, for it was something very much more while the right existed, and it did not terminate when the right of redemption was gone, but might continue at the will or through the inaction of another indefinitely."<sup>228</sup>

The purchaser's interest and that of the judgment debtor are very likely to conflict during the period when it is uncertain whether a redemption will be made or not, especially if the property is of such a character as that it will be somewhat consumed or destroyed, or its value impaired by ordinary use.<sup>229</sup> The most

Edw. Ch. 417; *Wright v. Douglass*, 2 N. Y. 373; *Green v. Clark*, 31 Cal. 591; *Abadie v. Lobero*, 36 Cal. 397; *Smith v. Colvin*, 17 Barb. 157; *Small v. Small*, 16 S. C. 64; *Pennsylvania etc. R. R. v. Cleary*, 125 Pa. St. 442, 11 Am. St. Rep. 913.

<sup>227</sup> *Young v. Du Putron*, 37 Fed. Rep. 46.

<sup>228</sup> *Whiting v. Butler*, 29 Mich. 129.

<sup>229</sup> In most states statutory provisions now fix the respective rights of judgment debtors and purchasers to the rents, profits, and possession of land sold under execution, during the redemption period. A majority of these statutes give the right thereto to the judgment debtor or those claiming under him. Ann. Ind. Stats., 1894, § 779; Code of Iowa, 1897, § 4045; Gen. Stats. Kan., 1897, § 521; Ky. Stats., 1894, §§ 1684, 2364; Howell's Ann. Stats. Mich., § 7950; Minn. Stats.,

familiar instances of this are quarries, mines and oil wells. With respect to these in the absence of any statute to the contrary the debtor continues to have the right to work them in the customary way. His rights are substantially those of a tenant for years, and whatsoever might be lawfully done by a tenant for years of the same property may, without legal impropriety, be done by him.<sup>230</sup> "The debtor may, pending the sale and until the acknowledgment of the deed, cut the ripened grain, mine the coal, or receive the flow of oil, and apply the produce to his own use."<sup>231</sup>

In Alabama, the purchaser at an execution sale is entitled to possession and to the rents and profits during the redemption period. He is under no duty to account to the judgment debtor until put in default by a tender and refusal of the redemption money,<sup>232</sup> but rents and profits which accrued before a tender and refusal may be set off against permanent improvements made by the purchaser in possession.<sup>233</sup> A tenant of the purchaser is entitled to crops growing on the land at the time of redemption.<sup>234</sup> The controlling idea of

1894, § 5477; Mont. Code Civ. Proc., 1895, § 1239; N. Y. Code Civ. Proc., 1895, § 1441; Ballinger's Ann. Codes and Stats. Wash., § 5299. But the interests of the purchaser are recognized by giving him the right to restrain the waste or destruction of the premises during the redemption period. Gen. Stats. Kan., 1897, § 543; Minn. Stats., 1894, § 5477; Mont. Code Civ. Proc., 1895, § 1239. Where the purchaser is entitled to the possession during this period it is usually provided that he shall account for the rents and profits to the judgment debtor or redemptioner desiring to redeem. Cal. Code Civ. Proc., § 707; Mass. Pub. Stats., 1882, p. 1012, § 32; Gen. Stats. Nev., 1885, § 3260; Rev. Code N. D., 1895, § 5549; Hill's Ann. Code of Or., 2d ed., § 807; Code of Tenn., 1884, § 2958; Rev. Stats. Utah, 1896, § 3267; Code of Ala., 1886, § 1880.

<sup>230</sup> Ward v. Carp River Iron Co., 47 Mich. 65, 50 Mich. 522.

<sup>231</sup> Hardenburg v. Beecher, 104 Pa. St. 20.

<sup>232</sup> Spoar v. Phillips, 27 Ala. 193; Weathers v. Spears, 27 Ala. 455.

<sup>233</sup> Parmer v. Parmer, 74 Ala. 285.

<sup>234</sup> Gardner v. Lanford, 86 Ala. 508.



statutes regulating the rights of judgment debtors and purchasers in and to the rents, profits, and possession of land from its sale on execution until its redemption, or until the expiration of the period of redemption, is that judgment creditors are entitled to, and should receive, no more than their debts, with interest and proper charges. Any deviation from this idea must entail injustice upon one or the other of these classes.<sup>235</sup> Under the California statute a tenant by lease subsequent to a sale of the leased premises on execution is liable to the purchaser for rent during the period between the sale and a redemption, and, since he is deemed to have taken possession with notice of the purchaser's rights, he cannot escape this liability by pleading payment to his lessor in advance.<sup>236</sup>

<sup>235</sup> *Balfour v. Rogers*, 64 Fed. Rep. 925.

<sup>236</sup> *Harris v. Foster*, 97 Cal. 293, 88 Am. St. Rep. 187.

## CHAPTER XXIV.

## THE DEED.

- § 324. The necessity for a conveyance.
- § 325. The necessity of authority to make a conveyance.
- § 326. How the execution of the deed may be compelled.
- § 327. By whom the deed may be made.
- § 328. When and to whom may be made.
- § 329. Form, recitals, and variances.
- § 330. Description of property.
- § 331. The acknowledgment.
- § 332. Executing second deed where the first is defective.
- § 333. The effect of deeds by relation.
- § 334. Contradicting.

§ 324. **The Necessity for a Conveyance.**—In order to divest the legal title held by the defendant, a conveyance must, in most of the states, be made by the proper officer, in pursuance of a prior levy and sale.<sup>1</sup> Until he receives this muniment of title, the rights of the purchaser are imperfect and inchoate. Though he is entitled on demand to receive a conveyance, he cannot be treated as the owner of the property till it has vested in him by a deed executed by the proper authority.<sup>2</sup> In Washington, where a sheriff's deed was

<sup>1</sup> *Hayes v. N. Y. M. Co.*, 2 Colo. 273; *Goss v. Meadors*, 78 Ind. 528.

<sup>2</sup> *Spoor v. Phillips*, 27 Ala. 193; *Doe v. Donston*, 1 Barn. & Ald. 230; *Robinson v. Garth*, 6 Ala. 204, 41 Am. Dec. 47; *Kelly v. The Governor*, 14 Ala. 541; *Young v. Withers*, 8 Dana, 165; *Doe v. Miller*, 10 U. C. Q. B. 65; *Smith v. Houston*, 16 Ala. 111; *Duprey v. Moran*, 4 Cal. 196; *Curtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 460; *Warfield v. Woodward*, 4 G. Greene, 386; *Anthony v. Wessel*, 9 Cal. 103; *People v. Mayhew*, 26 Cal. 655; *Childress v. Allin*, 17 La. 37; *Dufour v. Camfranc*, 11 Mart. 607, 13 Am. Dec. 360; *Strain v. Murphy*, 49 Mo. 337; *Rogers v. Cawood*, 1 Swan, 142, 55 Am. Dec. 729; *Leger v. Doyle*, 11 Rich. 109, 70 Am. Dec. 240; *Holmes v. McMaster*,

executed in the name of a purchaser after his death, it was objected to as void on that ground. This was apparently conceded, but the court held that, as the person claiming under the deed was in possession of the property, it was not material for the purposes of the action whether the deed was valid or not, saying: "The execution of the deed after the time for redemption had expired was a purely ministerial act on the part of the officer, and could have been compelled by the purchaser or those claiming under him at any time in an appropriate proceeding for that purpose. Until the sale had been set aside the certificate of the purchase would be as full protection as though the legal title had been conveyed by the deed in pursuance of the statute." <sup>3</sup>

In Maryland it has been "held that the sale of land by the sheriff, seized under fieri facias, transferred the legal estate to the vendee by operation of law; and that a deed from the sheriff was not necessary." <sup>4</sup> In Texas, the supreme court has said that "the making of a deed by the sheriff is but a ministerial act; and if the judgment and execution be valid and regular, the deed itself may be omitted in the evidence, if it be shown that the party claiming under the deed purchased under the execution." <sup>5</sup> In Louisiana, a sheriff's deed is not essential. It is merely an additional muniment of title.

<sup>1</sup> Rich. Ch. 340; Schermerhorn v. Merrill, 1 Barb. 511; Smith v. Colvin, 17 Barb. 157; Crutsinger v. Catron, 10 Humph. 24; Edwards v. Miller, 4 Helsk. 314; Blodgett v. Perry, 97 Mo. 263, 10 Am. St. Rep. 307; Gross v. Washington (Tenn. Ch. App.), 38 S. W. 442; Turner v. Sawyer, 150 U. S. 578.

<sup>3</sup> Diamond v. Turner, 11 Wash. 189; Stevens v. Ferry, 48 Fed. Rep. 7.

<sup>4</sup> Remington v. Linthicum, 14 Pet. 92; Boring v. Lemmon, 5 Har. & J. 223.

<sup>5</sup> Leland v. Wilson, 34 Tex. 91; Flemming v. Powell, 2 Tex. 225.

The facts necessary to authorize its execution operate, in its absence, to transfer the legal title.<sup>6</sup> The delivery of a sheriff's deed must be presumed from the fact that that officer filed it for record in the office of the recorder of deeds, and the grantee took and held possession of the lands for many years, and the deed itself was found in the possession of his personal representative.<sup>7</sup> Probably the execution of such a deed may and ought to be presumed from the fact that the officer took possession of the property sold under the execution, and held it for a great number of years, apparently without objection.<sup>8</sup> If the sale is made to a mortgagee under a decree foreclosing a mortgage, in a state where such mortgage vests him with the legal title, a conveyance may be unnecessary, for, as he already has the legal title, the failure of the commissioner to execute a deed could not operate to divest him of such title.<sup>9</sup> But in all cases where the purchaser at a chancery sale has not already the legal title he must obtain it by a conveyance. Courts of equity have always disclaimed the power to act directly on a title. Their decrees never divest the title of one person and vest it in another. To accomplish this object, they must always be aided by a statute, or supplemented by a conveyance.<sup>10</sup> But the conveyance need not be made by the defendant personally. A commissioner may be appointed to execute such convey-

<sup>6</sup> *Jouet v. Mortimer*, 29 La. Ann. 206; *Onorato's Interdiction*, 46 La. An. 73.

<sup>7</sup> *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82.

<sup>8</sup> *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45.

<sup>9</sup> *Monroe v. Stephens*, 80 Ky. 155.

<sup>10</sup> *Doe v. Jackson*, 51 Ala. 514; *Doe v. Hardy*, 52 Ala. 292; *Wallis' Heirs v. Wilson's Heirs*, 34 Miss. 357; *Mummy v. Johnston*, 8 A. K. Marsh. 220; *Shepherd's Lessee v. Commissioners*, 7 Ohio, 271; *Proctor v. Ferebee*, 1 Ired. Eq. 143, 36 Am. Dec. 34.

ance, as the act of the defendant. In the case of a judicial sale, the master, or other officer authorized to make the sale, has power to execute a conveyance in pursuance thereof, which, when duly executed, "is as effectual to convey the title as the deed of a sheriff, made pursuant to a sale under an execution issued upon a judgment at law."<sup>11</sup> The necessity for a conveyance does not exist where the lands of the defendant are extended under an *elegit*. The proceedings of the sheriff and the jury summoned by him, when properly set forth in his return, operate as a transfer of the defendant's title, and, without any further assurance of title, make the judgment creditor a tenant by *elegit*.

**§ 325. Deed Made Without Authority is Void.**—A deed made by an officer is merely the execution of an authority created by statute. Unless the essential conditions prescribed by statute exist, the power to execute the deed cannot be affirmed; and an officer's deed, executed where he had no power or authority to make it, is, in legal effect, no deed whatever. It is absolutely void. It is impossible, owing to conflicting decisions, to say precisely what must in all cases exist to confer authority upon an officer to execute a deed. These four things may, however, beyond question, be affirmed to be indispensable—for without them a deed purporting to be made by an officer has no legal effect: there must exist a judgment<sup>12</sup> and an execution,<sup>13</sup> neither of which is void; the time for redemption must have ex-

<sup>11</sup> *Miller v. Sherry*, 2 Wall. 248.

<sup>12</sup> *Leland v. Wilson*, 34 Tex. 79. See § 350.

<sup>13</sup> *Watson v. Tindal*, 24 Ga. 494, 71 Am. Dec. 142; *Dunlap v. Fant*, 74 Miss. 197.

pired without any redemption having been made;<sup>14</sup> and the lands which the officer undertakes to convey must be situate within the territorial jurisdiction in which he is authorized to act.<sup>15</sup>

None of the matters of which we have spoken as indispensable to a sheriff's deed can be supplied by any recital in the deed itself, nor can the judgment debtor and those claiming under him be estopped by the deed from insisting that some of such matters did not exist, and that the conveyance is, therefore, void. Hence, though such a deed recites that the time for redemption has expired, and that no one has redeemed, or offered to do so, evidence may be received to prove that a valid redemption had been made and tendered.<sup>16</sup>

A sale may be made under several writs. Some of these writs may be valid, and the others void. If either of the writs under which a sale is made is valid, the officer has the power to sell, and consequently the power to convey. If in his deed he recites several writs, some of which are valid and some void, the recital of the void writs may be treated as surplusage, and the deed, being supported by the valid writ and the power to sell and convey thereby conferred, is as effective as if all the writs were unobjectionable.<sup>17</sup>

**§ 326. How the Execution of a Deed may be Compelled.**—The officer authorized by law to make the con-

<sup>14</sup> *Gorham v. Wing*, 10 Mich. 486; *Delahay v. McConnell*, 4 Scam. 157; *Perham v. Kuper*, 61 Cal. 831; *Conner v. Long*, 63 Ia. 295. See § 316.

<sup>15</sup> *Hanby v. Tucker*, 23 Ga. 132, 68 Am. Dec. 514.

<sup>16</sup> *Phillips v. Hogart*, 113 Cal. 552, 54 Am. St. Rep. 369.

<sup>17</sup> *Glasgow v. Smith*, Over. 144; *Bailey v. Morgan*, Busb. 852; *Seawell v. Cape Fear Bank*, 3 Dev. 279, 22 Am. Dec. 722; *Hattan v. Dew*, 8 Murph. 260; *Richards v. Allen*, 3 E. D. Smith, 399; *Banks v. Evans*, 10 Smedes & M. 85, 48 Am. Dec. 734; *Skirk v. Wilson*, 13 Ind. 129.

veyance may refuse to do so. In such an event, the holder of the certificate of purchase seems to have three available remedies, each of which is, in ordinary circumstances, adequate for the enforcement of his rights; he may, on motion in the original case, obtain a rule commanding the sheriff to execute a deed;<sup>18</sup> or he may proceed against the sheriff in equity, and there compel him to comply with the terms of the certificate of purchase;<sup>19</sup> or he may accomplish a like result by proceeding by mandamus.<sup>20</sup>

§ 327. **By Whom the Deed may be Made.**—The officer who made the sale, whether he continues in office or not, is, in ordinary circumstances, and in the absence of statutory provisions to the contrary, the proper person to make the conveyance.<sup>21</sup> But the execution of the conveyance is a mere ministerial act. Hence, it may be done by a deputy acting in the name of his principal. The power of sheriffs to appoint under and deputy sheriffs seems always to have been conceded; and, whenever a person has been appointed an under or deputy sheriff in such a mode as is regarded as valid by the laws of his state, he has full authority

<sup>18</sup> *People v. Haskins*, 7 Wend. 468; *Stults v. Brown*, 112 Ind. 370, 2 Am. St. Rep. 190; *Lamb v. Sherman*, 19 Neb. 681. In Georgia, it has been held that jurisdiction to order an officer to make a conveyance pursuant to an execution sale is confined to the superior courts, and hence cannot be exercised by a court of ordinary. This ruling seems to be upon the ground that inferior courts, such as city, county, and justices' courts, ought not to be entrusted with the exercise of this jurisdiction. *Burkhalter v. O'Connor*, 100 Ga. 366.

<sup>19</sup> *Witham v. Smith*, 5 Grant (U. C.), 203.

<sup>20</sup> *People v. Irwin*, 14 Cal. 428; *People v. Fleming*, 2 N. Y. 484; *Burkhalter v. O'Connor*, 100 Ga. 366.

<sup>21</sup> *Anthony v. Wessel*, 9 Cal. 103; *People v. Boring*, 8 Cal. 406, 68 Am. Dec. 331; *Head v. Daniels*, 38 Kan. 11; *Porter v. Mariner*, 50 Mo. 364.

to execute conveyances in the name of his principal,<sup>22</sup> though his appointment was made by parol only.<sup>23</sup> But here, as in other cases, the act must appear to be that of the principal. Hence, deeds made by deputy sheriffs in their own names have uniformly been declared void.<sup>24</sup> In Michigan, it is claimed that a distinction ought to be made between the acts of an under sheriff and those of a deputy. The former, it is said, may act in his own name;<sup>25</sup> while the latter must always assume to act in the name of his principal. We doubt the propriety of this distinction. The authority of a deputy to execute a deed seems to continue as long as that of his principal, unless he is removed from office by such principal. Hence, the deputy may make a deed after his principal is out of office,<sup>26</sup> though not after his death.<sup>27</sup> If a sale is made by a deputy, the conveyance may be executed by the principal.<sup>28</sup>

When the term of the officer who made the sale terminates, his power to make the conveyance continues.

<sup>22</sup> *Kellar v. Blanchard*, 21 La. Ann. 38; *Evans v. Wilder*, 7 Mo. 359; *Jackson v. Bush*, 10 Johns. 223; *Sandford v. Roosa*, 12 Johns. 162; *Gorham v. Gale*, 7 Cow. 739, 17 Am. Dec. 549; *Haines v. Lindsey*, 4 Ohio, 88, 19 Am. Dec. 586; *Anderson v. Brown*, 9 Ohio, 151; *Carr v. Hunt*, 14 Iowa, 206; *Young v. Smith*, 10 B. Mon. 293; *Glasgow v. Smith*, 1 Over. 144; *Ansley v. Hart*, 77 Ga. 42; *Terrell v. Martin*, 64 Tex. 121.

<sup>23</sup> *McGee v. Eastis*, 3 Stew. 307. See, also, *Jackson v. Davis*, 18 Johns. 7.

<sup>24</sup> *Robinson v. Hall*, 33 Kan. 139; *Samuels v. Shelton*, 48 Mo. 449; *Lewes v. Thompson*, 3 Cal. 266; *Evans v. Wilder*, 7 Mo. 359; *Anderson v. Brown*, 9 Ohio, 151; *Parker v. Kett*, 1 Salk. 96.

<sup>25</sup> *Calender v. Olcott*, 1 Mich. 344.

<sup>26</sup> *Tuttle v. Jackson*, 6 Wend. 213; *Mills v. Tukey*, 22 Cal. 373, 83 Am. Dec. 74; *Robinson v. Hall*, 33 Kan. 139. In such circumstances, the authority of the deputy ought to be shown. *Cloud v. El Dorado Co.*, 12 Cal. 128, 73 Am. Dec. 526.

<sup>27</sup> *Anderson v. Brown*, 9 Ohio, 151.

<sup>28</sup> *Ogden v. Walters*, 12 Kan. 282.



In fact, unless the new sheriff is especially authorized by statute, he seems to have no authority whatever to make a conveyance based on a sale made by his predecessor.<sup>29</sup> In a number of the states, the new sheriff is authorized to make conveyances in certain contingencies, as when the ex-sheriff is dead, or has departed from the state, or is, from some other cause, disabled from acting.<sup>30</sup> But in these states the act of the new sheriff seems to be regarded with suspicion. He is considered to be in the exercise of a special statutory authority. Hence, persons claiming under his deed are required to show that the contingency requisite to authorize his action did, in fact, arise, and that his authority was pursued in the manner and under the circumstances designated by the statute.<sup>31</sup> In some of the states, the conveyance must be executed by the person in office when the certificate of sale is returned, and a deed thereon demanded;<sup>32</sup> while in others, the person in office and the one who made the sale seem equally competent to act.<sup>33</sup> In Missouri, a sheriff who has made a sale may, after the expiration of his term, execute a conveyance pursuant thereto, unless the court shall, by order, direct all business to be transferred to the next sheriff. If the court makes no order, the

<sup>29</sup> *People v. Bowring*, 8 Cal. 406, 68 Am. Dec. 831; *Lemon v. Craddock*, Litt. Sel. Cas. 261, 12 Am. Dec. 801; *Porter v. Mariner*, 50 Mo. 364; *Anthony v. Wessel*, 9 Cal. 103. See ante, § 62.

<sup>30</sup> *Mills v. Tukey*, 22 Cal. 373, 83 Am. Dec. 74; *Jack M. Co. v. Megginson*, 82 Fed. Rep. 89.

<sup>31</sup> *Wortham v. Cherry*, 3 Head, 468; *Thornton v. Boyd*, 25 Miss. 598; *Harris v. Irwin*, 7 Ired. 432; *Phillips v. Jamison*, 14 B. Mon. 579; *Woods v. Lane*, 2 Serg. & R. 58; *Edwards v. Tipton*, 77 N. C. 222.

<sup>32</sup> *Conger v. Converse*, 9 Iowa, 554; *Fretwell v. Morrow*, 7 Ga. 264; *Fowble v. Rayberg*, 4 Ohio, 45; *Moore v. Willamette T. & L. Co.*, 7 Or. 359; *Faull v. Cooke*, 19 Or. 455, 20 Am. St. Rep. 856.

<sup>33</sup> *McElmurray v. Ardis*, 3 Strob. 212.

sheriff, on going out of office, may either make a conveyance or turn the business over to his successor.<sup>34</sup> Even if it happens that there is no person in existence authorized to make the conveyance, still the purchaser is not without adequate remedy. In Alabama, it has been held that a purchaser could sustain an action in equity to have the title of the defendant in execution declared to be divested by the sale.<sup>35</sup> This form of proceeding seems indefensible to us, because it assumes that courts of equity will, contrary to their ordinary practice, undertake to act directly upon the legal title. The more appropriate and more usual practice is to apply to the court for the appointment of some person to execute the deed.<sup>36</sup>

If a sale is judicial, and is made by an officer appointed by the court, he is the proper person to execute the conveyance. It is not unusual to specify in the decree that he is to convey, as well as to sell, but this is not necessary, as the authority to convey is presumed or implied from the power to sell.<sup>37</sup>

**§ 328. When and to Whom the Deed may be Made.—**The deed can only be made to the original purchaser<sup>38</sup> at the sale, or to his successor in interest. The interest of the purchaser may, as we have already shown,<sup>39</sup> be assigned; or it may, at his death, become vested in his heirs or devisees,<sup>40</sup> or his executors or ad-

<sup>34</sup> *Fortune v. Flfe*, 105 Mo. 433.

<sup>35</sup> *Stewart v. Stokes*, 33 Ala. 494, 73 Am. Dec. 429.

<sup>36</sup> *Sickles v. Hogeboom*, 10 Wend. 562; *People v. Boring*, 8 Cal. 406, 68 Am. Dec. 331; *Head v. Daniels*, 38 Kan. 11.

<sup>37</sup> *Young v. Teague*, Bail. Eq. 22; *Peake v. Young*, 40 S. C. 41.

<sup>38</sup> *Rice v. Smith*, 18 N. H. 369; *Johnson v. Adleman*, 85 Ill. 265; *Davis v. McVickers*, 11 Ill. 327.

<sup>39</sup> § 313.

<sup>40</sup> *Summer v. Palmer*, 10 Rich. 88; *Swink v. Thompson*, 31 Mo. 336; § 313.

ministrators, in trust for such heirs or devisees. Though the statute makes no direct provision for the issuing of a deed to any one but the purchaser, his power to assign the certificate of purchase, and the consequent right of his assignee to a conveyance, seem to be conceded. It is true that the question to whom a conveyance shall issue is one in which the parties to the action are not interested, and there have been cases asserting in general terms that, as long as the purchaser did not raise any objection, such parties could not insist that a conveyance was executed to one not entitled thereto, and, hence, very informal assignments have been sustained, in some instances amounting only to a direction on the part of the purchaser that the certificate or conveyance be issued to some other person.<sup>41</sup> But in a majority of the states, the judgment debtor retains the legal title and a right to the possession of the property until a conveyance is executed in pursuance of the sale, and we apprehend that he and his successors in interest may urge, as against a conveyance, that it was not made to the purchaser and that no sufficient authority existed to make it to any other person, and, hence, that it is void.

The fact of the assignment should be recited in the sheriff's deed; and when so recited, the deed is at least *prima facie* evidence that the assignment was made as therein stated.<sup>42</sup> A deed may be made to a person other than the purchaser without containing any recital to show why it was so made. Under the general presumption that official duty is regularly performed, it may well be assumed, until some testimony to the contrary

<sup>41</sup> *Hobson v. Ewan*, 62 Ill. 146; *Gibbs v. Davies*, 168 Ill. 205; *Ward v. Lowndes*, 96 N. C. 367.

<sup>42</sup> *Messerschmidt v. Baker*, 22 Minn. 81.

is adduced, that the officer has acted upon some competent and sufficient evidence of an assignment. In the only case falling within our observation the court, however, refused to so assume, and treated the conveyance as void.<sup>43</sup> In Illinois, where the statute declares that every certificate of purchase may be assigned by indorsement thereon, it was held that the production in evidence of the certificate, bearing no indorsement, impeached the recital in the deed that such certificate had been assigned, and proved that the deed was unauthorized and conveyed no title.<sup>44</sup> The assignee of a certificate of purchase is after such assignment subrogated to the rights of the purchaser.<sup>45</sup> The assignment may be made after as well as before the time for redemption expires.<sup>46</sup>

The earliest time at which a deed can properly be made in pursuance of an execution sale is at the payment of the purchase money, in those states in which the defendant has no right of redemption, or in which, though a right of redemption exists, a conveyance is permitted immediately after the completion of the sale.<sup>47</sup> If the sale is judicial the deed must be preceded by the confirmation of the sale,<sup>48</sup> as well as by the payment of the purchase price. If made by an officer in the absence of such payment, the court may treat it as a nullity, and proceed to resell the land.<sup>49</sup> In a majority of the states, the sale of real estate under execution is subject to redemption for a stated period, and the

<sup>43</sup> *Hannah v. Chase*, 4 N. D. 351, 50 Am. St. Rep. 656.

<sup>44</sup> *Carpenter v. Sherfy*, 71 Ill. 427.

<sup>45</sup> *Turner v. Madison Bank*, 78 Ind. 19.

<sup>46</sup> *Conger v. Babcock*, 87 Ind. 497; *Maddux v. Watkins*, 88 Ind. 74.

<sup>47</sup> *Ante*, § 316.

<sup>48</sup> *Ante*, § 311.

<sup>49</sup> *Johnson v. Hines*, 61 Md. 122.

right to a conveyance does not exist until the termination of such period. If the sheriff executes such conveyance during the continuance of the right of redemption, it is absolutely void.<sup>50</sup>

The latest time at which a conveyance may issue in pursuance of an execution or judicial sale has been very little discussed. As against the judgment debtor and volunteers under him, there is probably no limit. In Illinois the authority of the officer to execute such conveyance, unless directed to do so by the court, as against innocent purchasers for value, is limited to eight years and three months, that being the aggregate of the time during which a judgment may be a lien, added to the time allowed the debtor in which to redeem from the sale.<sup>51</sup> If eight years and three months have elapsed without the execution of a conveyance, the purchaser may apply to the court for an order directing the execution of such conveyance. Notice of the application must be given to the parties to be affected by the order. It will be granted unless "it would impair the rights of innocent purchasers for value, or purchasers have acquired a bar under any one of the statutes of limitations, or the circumstances would render it inequitable."<sup>52</sup>

The authority to convey is vested in the officer by virtue of the judgment, execution, and sale, and, in making a conveyance, he is the agent appointed by law rather than by the parties, and his authority is no more dependent upon their continuing to live or to have power to convey in their own behalf than it is upon

<sup>50</sup> Hall v. Yoell, 45 Cal. 584; Perham v. Kuper, 61 Cal. 331; Bernal v. Gleim, 33 Cal. 668; Gross v. Fowler, 21 Cal. 393.

<sup>51</sup> Rucker v. Dooley, 49 Ill. 377. 95 Am. Dec. 614; Cottingham v. Springer, 88 Ill. 90; Harman v. Larned, 58 Ill. 169.

<sup>52</sup> Schrader v. Peach, 77 Ill. 615.

their actual assenting to the conveyance. The death of a judgment debtor, either after or before the sale, if the sale, when made, was authorized, does not destroy or suspend the power of the officer making the sale to execute an appropriate conveyance, nor impair its force when executed.<sup>53</sup>

§ 329. **Of the Form and Recitals of the Deed and Variances Therein.**—A deed made by a sheriff, in pursuance of a sale under execution, ought, in addition to the matters contained in ordinary conveyances, recite—1. The rendition of the judgment, showing its date, the parties thereto, its amount, and the court wherein it was entered; 2. The date of the issuing of the execution and of its reception by the officer; 3. The levy; 4. That notice of the sale was given as prescribed by law; 5. That on a day specified, the property was sold to a person specified, for a designated sum, being the highest bid for the same; 6. That the time for redemption has expired without any person's redeeming the premises sold; and 7. If the conveyance is to a person other than the purchaser, that he has assigned to such person, or otherwise disclosing the reason why the purchaser is not named as the grantee. "Regularly, the deed should recite the recovery of the judgment, the name of the judgment creditor or creditors, and the judgment debtor or debtors, the issuing of the execution on the judgment, and the levy and sale thereunder."<sup>54</sup> In Ohio the statute directs that the deed "shall contain the names of the parties to the judgment, the date and amount of the judgment, the substance of the execution or order on which the property was sold, the sub-

<sup>53</sup> *Thomas v. Thomas*, 87 Ky. 343; *United States v. Insley*, 54 Fed. Rep. 221.

<sup>54</sup> *Hihn v. Peck*, 30 Cal. 288; *Donahue v. McNulty*, 24 Cal. 411, 85 Am. Dec. 78; *Wiseman v. McNulty*, 25 Cal. 230.

stance of the officer's return thereon, and the order of confirmation." <sup>55</sup> In Missouri the "statute requires the deed to recite the names of the parties to the execution, the date when issued, the date of the judgment, order, or decree, and other particulars as recited in the execution; also, a description of the property, the time, place, and manner of the sale." <sup>56</sup> The statute of that state further declares that execution shall not issue on certain transcripts, "if the defendant is a resident of the county, until an execution shall have been issued by the justice, directed to a constable of the township in which the defendant resides, and returned that the defendant had no goods and chattels whereof to levy the same"; but the fact of the issue of execution by the justice, and its return *nulla bona*, need not be recited in the sheriff's deed. <sup>57</sup> Nor need the deed recite that the posting of the notice of sale was at the courthouse door, as the statute requires it to be. <sup>58</sup>

Generally, statutes prescribing the recitals to be inserted in a sheriff's deed are regarded as directory merely. <sup>59</sup> In the commencement of this section we stated that the deed ought to contain certain recitals. The word "ought," as there used, is by no means equivalent to "must." Each of the recitals there specified ought to be incorporated in each sheriff's deed, so that the source of his authority, and the time and manner of

<sup>55</sup> Glauque's Rev. Oh. Stats., 7th ed., § 5401.

<sup>56</sup> Wack v. Stevenson, 54 Mo. 485; Wilhite v. Wilhite, 53 Mo. 71; Tanner v. Stine, 18 Mo. 580, 59 Am. Dec. 320; Carpenter v. King, 42 Mo. 219.

<sup>57</sup> Perkins v. Quigley, 62 Mo. 498.

<sup>58</sup> Evans v. Roberson, 92 Mo. 192, 1 Am. St. Rep. 701.

<sup>59</sup> Clark v. Sawyer, 48 Cal. 133; Perkins v. Dibble, 10 Ohio, 433, 36 Am. Dec. 97; Jordan v. Bradshaw, 17 Ark. 106, 65 Am. Dec. 419; Bettison v. Budd, 17 Ark. 546, 65 Am. Dec. 442; Holman v. Gill, 107 Ill. 467.

its exercise, can be ascertained with ease and certainty. But except where a contrary rule has resulted from statutory prescriptions, it is probable that each, and possibly that all, of these recitals may be omitted from a deed without destroying its validity. The authority of the officer to convey depends upon the existence of certain precedent facts. The existence of these facts may be shown otherwise than by the recitals in the deed. In truth, the more important facts, such as the rendition and entry of the judgment, and the issuing of the execution, cannot, in most states, be established by the recitals in the deed. The judgment and execution must be offered in evidence, unless, though once existing, their production has become impossible. Hence, if it is shown that the officer was authorized to convey, the omission to recite in the deed the facts upon which his authority was based will almost uniformly be regarded as in no way impairing the effect of his deed.<sup>60</sup> It is not material that the officer does not add his official designation after his signature, if such designation appears in the body of the deed. Probably it is not necessary that it appear either in the body of the deed or following his signature that the grantor is acting in any official capacity, unless he has some interest in the property which might be the subject of his personal grant. The general rule with respect to conveyances by the donee of a power is, we think, applicable to sheriffs and others acting by virtue of execution

<sup>60</sup> *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Jackson v. Pratt*, 10 Johns. 381; *Welsh v. Joy*, 13 Pick. 477; *Hayward v. Cain*, 110 Mass. 273; *Armstrong v. McCoy*, 8 Ohio, 128, 31 Am. Dec. 435; *Perkins v. Dibble*, 10 Ohio, 433, 36 Am. Dec. 97; *Jackson v. Jones*, 9 Cow. 182; *Averill v. Wilson*, 4 Barb. 180; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Craig v. Vance*, Over. 209; *Harrison v. Maxwell*, 2 Nott & McC. 347, 10 Am. Dec. 611; *Carter v. Spencer*, 7 Ired. 14.



or judicial sales.<sup>61</sup> The failure to recite a levy,<sup>62</sup> or to show why a sale was not made at the first term,<sup>63</sup> is of no consequence.

In Tennessee a sheriff's deed must assume or recite everything necessary to make a valid title. To make such title a judgment, execution and levy are indispensable. A deed which does not recite their existence is fatally defective. "It would be no answer to this to show that in fact there was a judgment, execution, and levy."<sup>64</sup>

The effect of the recitals in a deed as evidence of the matters therein asserted is difficult to state with precision. It is indispensable to the officer's authority that there should have been a judgment or an execution, and that both were sufficient in form and substance to authorize him to make the sale in pursuance of which he assumed to convey the property. In the absence of these, he is not authorized to recite. In other words, his recitals are but the history of what he has done under a valid writ, but if the writ or the antecedent proceedings are invalid, or, though valid, for some

<sup>61</sup> Note to *Tyler v. Herring*, 19 Am. St. Rep. 292; *Exum v. Baker*, 118 N. C. 545. In the case last cited, the court said: "When the donee of a power to sell has an interest of his own in the property affected by the power, and makes a conveyance of the property without reference to the power, the construction is that he intends to convey only what he might rightfully convey without the power. *Towles v. Fisher*, 77 N. C. 437, and the authorities cited by counsel in that case. 4 Kent, 334, 335. When, however, the donee has no interest in the subject of the conveyance, but only a naked power, as in the case before us, then the intent apparent upon the face of the instrument to sell would be deemed a sufficient reference to the power to make the instrument an execution of it, as the words of the instrument could not be otherwise satisfied. *Siler v. Ward*, *Repository & Taylor's Term*, 161."

<sup>62</sup> *Foulk v. Colburn*, 48 Mo. 225.

<sup>63</sup> *Groner v. Smith*, 49 Mo. 318; *Lewis v. Morrow*, 89 Mo. 174.

<sup>64</sup> *Byers v. Wheatley*, 3 Baxt. 160.

purposes cannot authorize the acts done, the officer is not vested with power to become the accredited historian of them. Except as to these preliminary indispensables, the recitals are prima facie, but not conclusive, evidence of the facts stated in them, in so far as such facts are material to support or to overthrow the conveyances.<sup>65</sup> On the other hand, as to matters essential to the existence of an officer's authority to act, his deed, whatsoever be the recitals therein, is not even prima facie evidence.<sup>66</sup> So, where certain facts are established by the record or other papers in the cause, their effect cannot ordinarily be changed by recitals in the deed. Thus, if the law fixes the time for the commencement of the judgment lien, a sheriff cannot, by misreciting it in his conveyance, change such time, so that the purchaser's title must be deemed to commence either at a later or an earlier day.<sup>67</sup> While the recital of the several facts upon which the officer's authority to convey depends is not indispensable, yet it is usually made or attempted in each deed. The attempt frequently results in mistakes. The name of one of the parties, the date of some of the facts, or the amount of the execution or of the sale may be incorrectly stated. But if the recital is unnecessary, the fact that it is either imperfectly or incorrectly made can be of no consequence. Hence, the courts have uniformly disregarded variances, errors, and omissions in the recitals of deeds made in pursuance of sales under exe-

<sup>65</sup> *Parler v. Johnson*, 81 Ga. 254; *Farrior v. Houston*, 100 N. C. 369, 6 Am. St. Rep. 597; *Willamette R. E. Co. v. Hendrix*, 28 Or. 485, 52 Am. St. Rep. 800.

<sup>66</sup> *Hasbrouck v. Burhans*, 42 Hun, 376; *Hannah v. Chase*, 4 N. D. 851, 50 Am. St. Rep. 656; *Willamette R. E. Co. v. Hendrix*, 28 Or. 485, 52 Am. St. Rep. 800.

<sup>67</sup> *Owen v. Baker*, 129 Ind. 407, 20 Am. St. Rep. 618.

cution.<sup>68</sup> In case of a disagreement between the deed and the return, certificate, or other preceding record, the former is to be regarded as correct, and is entitled to control.<sup>69</sup> In Pennsylvania a party claiming under a deed was permitted to support it by showing that the sale was in fact made by the officer who executed the deed, though the recitals showed the sale to have been made by his predecessor in office.<sup>70</sup>

**§ 330. The Description of Property.**—The deed must, of course, contain a description of the property sold, and which the officer making the sale assumes to convey. We have, in a preceding chapter, considered the general question of the sufficiency of descriptions of

<sup>68</sup> *Reading v. Waterman*, 46 Mich. 107; *Harlan v. Harlan*, 14 Lea, 107; *Union Bank v. McWharters*, 52 Mo. 84; *Sneed v. Reardon*, 1 A. K. Marsh. 217; *Carpenter v. King*, 42 Mo. 219; *Matthews v. Thompson*, 3 Ohio, 272; *Jackson v. Jones*, 9 Cow. 182; *Howard v. North*, 5 Tex. 311, 51 Am. Dec. 769; *Holloway v. Birtwhistle*, 2 Nott & McC. 350, note; *Harrison v. Maxwell*, 2 Nott & McC. 347, 10 Am. Dec. 611; *Craig v. Vance*, Over. 209; *Cherry v. Woolard*, 1 Ired. 438; *Saltonstall v. Riley*, 28 Ala. 164, 65 Am. Dec. 334; *Swift v. Agnes*, 38 Wis. 228; *Hattan v. Dew*, 3 Murph. 260; *Driver v. Spence*, 1 Ala. 540; *Henley v. Branch Bank*, 16 Ala. 552; *Wilson v. Campbell*, 33 Ala. 249, 70 Am. Dec. 586; *Stow v. Steel*, 45 Ill. 328; *Doe v. Rue*, 4 Blackf. 263, 29 Am. Dec. 368; *Herrick v. Graves*, 16 Wis. 157; *Hughes v. Dice*, 1 Swan, 329; *Allen v. Sales*, 56 Mo. 28; *Carmichael v. Strawn*, 27 Ga. 341; *McGuire v. Kouns*, 7 T. B. Mon. 386, 18 Am. Dec. 187; *Reid v. Heasley*, 9 Dana, 324; *Carpenter v. Russell*, 129 Ind. 571; *Alexander v. Bourdier*, 43 La. An. 321; *Karnes v. Alexander*, 92 Mo. 660; *Lamb v. Sherman*, 19 Neb. 681; *Wilson v. Taylor*, 98 N. C. 275; *Davis v. Bargas*, 12 Tex. Civ. App. 59; *Ballew v. Casey* (Tex.), 9 S. W. 189. Hence a mistake in reciting the precise day of the sale is immaterial. *Strain v. Murphy*, 49 Mo. 337; *Buchanan v. Tracy*, 45 Mo. 437.

<sup>69</sup> *Smith v. Kelly*, 3 Murph. 507; *Rogers v. Cawood*, 1 Swan, 142, 55 Am. Dec. 729; *Carroll v. Scheen*, 34 La. Ann. 423; *Miller v. Miller*, 89 N. C. 402.

<sup>70</sup> *Leshey v. Gardiner*, 3 Watts & S. 314, 38 Am. Dec. 764. The doctrines of this case are questionable. *Edwards v. Miller*, 4 Heisk. 314.

real estate, and the extent to which those descriptions may be assisted and explained by parol and other evidence not contained in the record of the case in which the deed is made.<sup>71</sup> This renders it unnecessary for us to give the question any considerable space in this chapter. It is impossible to give an instrument any effect, unless the thing upon which it is to act can be ascertained. Hence, a description from which the lands intended to be transferred can be located is indispensable to the validity of every deed. If the description is senseless, so that it cannot with certainty be applied to any known tract, or if it can be applied to some part of a known tract, but the particular part cannot be ascertained, the deed must be regarded as void.<sup>72</sup> The same result must follow if the description given is equally applicable to two or more tracts of land, when there is nothing in the return of the officer of his proceedings under the writ from which the tract to which the description refers can be ascertained.<sup>73</sup> In those states in which the execution of a conveyance is not required to divest the title of the judgment debtor, an error in its descriptive words is immaterial,

<sup>71</sup> See § 281.

<sup>72</sup> *Deloach v. State Bank*, 27 Ala. 487; *Clarke v. Belmear*, 1 Gill & J. 443; *Thomas v. Turvey*, 1 Har. & G. 435; *Boardman v. Reed*, 6 Pet. 328; *Throckmorton v. Moon*, 10 Ohio, 42; *Jackson v. Roosevelt*, 13 Johns. 97; *Evans v. Ashley*, 8 Mo. 177; *Clemens v. Rannells*, 34 Mo. 579; *Hughes v. Streeter*, 24 Ill. 647, 76 Am. Dec. 777; *Wright v. Pond*, 10 Conn. 255; *Pound v. Pullen*, 3 Yerg. 338; *Worthington v. Hylyer*, 4 Mass. 196; *Head v. James*, 13 Wis. 641; *Ronkendorff v. Tayler*, 4 Pet. 349; *Lafferty v. Byers*, 5 Ohio, 458; *Hannel v. Smith*, 15 Ohio, 134; *Winkler v. Higgins*, 9 Ohio St. 599; *Spellman v. Curtinius*, 12 Ill. 409; *Richardson v. State*, 5 Blackf. 51; *Edmundson v. Hooks*, 11 Ired. 373; *McGary v. Dunn*, 1 La. Ann. 338; *Childs v. Ballou*, 5 R. I. 537; *Marmaduke v. Tennant*, 4 B. Mon. 210; *Landreaux v. Foley*, 13 La. Ann. 114.

<sup>73</sup> *Tatum v. Croom*, 60 Ark. 487; *Cadwalader v. Nash*, 73 Cal. 43; *Beze v. Calvert*, 2 Tex. Civ. App. 202.

if otherwise the acts necessary to divest such title appear, and also the lands affected thereby.<sup>74</sup>

It is by no means essential that, from a mere inspection of the description, the court should be enabled to know what lands are intended. The tract may be designated by some name not understood by the court, but perfectly familiar to all persons acquainted with the neighborhood in which the land is situated. Evidence may always be received to show the signification of such a name, or to show that any other descriptive words, though apparently meaningless or uncertain, do in fact designate a particular tract in such a manner that its identity would be apparent to all persons to whom it is familiar.<sup>75</sup>

A general declaration may, doubtless, be found in the opinions of various courts to the effect that a conveyance made pursuant to an execution or judicial sale must be more strictly construed than a voluntary conveyance, because the judgment debtor cannot be presumed to have any intent to give the conveyance effect. We think such declarations are not true, and that any descriptive words which would be sufficient in a voluntary conveyance are equally adequate in a conveyance made by the sheriff or other officer.<sup>76</sup> Furthermore, descriptive words which are inadequate in voluntary conveyances are not necessarily so in a sheriff's deed, because they may be made certain by

<sup>74</sup> Logan v. Pierce, 66 Tex. 126; Brown v. Elmendorf (Tex. Civ. App.), 25 S. W. 145.

<sup>75</sup> McPike v. Allman, 53 Mo. 551; Marshall v. Greenfield, 8 Gill & J. 349, 29 Am. Dec. 559; Webster v. Blount, 39 Mo. 500; see ante, § 281; Hammond v. Johnston, 93 Mo. 198; Giddings v. Day, 84 Tex. 605; Smith v. Crosby, 86 Tex. 15, 40 Am. St. Rep. 818.

<sup>76</sup> Parler v. Johnson, 81 Ga. 254; Herrick v. Morrill, 37 Minn. 250, 5 Am. St. Rep. 841; Smith v. Nelson, 110 Mo. 552; Perry v. Scott, 109 N. C. 374; Overand v. Menzer, 83 Tex. 122.

its recitals and other writings which are thereby so referred to that they may be properly considered as a part of the deed for the purpose of making its descriptive language more perfect. Thus, such a conveyance is ordinarily preceded by a levy and advertisement of sale, and often by a certificate of purchase, some or all of which are referred to in the deed. Hence, in addition to the words used for the purpose of description, it usually appears from the recitals that the land intended to be conveyed is that levied upon under a writ designated, and is that land which, at a time named, was advertised for sale, and afterward sold, and, though the descriptive words in the deed may be inadequate, or, in some respects, erroneous, such inadequacy may be made adequate or such error corrected by reference to the officer's return of his levy, or his notice of sale, or to that part of his return stating the property sold, and the person by whom it was purchased. In either event, we think the description must be regarded as sufficient to divest the title of the judgment debtor if all doubt is removed by incorporating in it the information derived from these various writings, all of which merely constitute successive steps in a proceeding of which the deed is but the last.<sup>77</sup>

The deed, and, in the case of a judicial sale, the decree and order of sale, may refer to some other paper or to some record for the purposes of description, so that it is necessary to read the paper or record referred to to ascertain what has been sold and conveyed. Such references are not unusual in voluntary conveyances; and we believe deeds which but for them would be meaningless have always been sustained, the de-

<sup>77</sup> *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841; *Hermann v. Likens*, 90 Tex. 448.

scription referred to being very properly treated as if copied into the deed. It was formerly held in California that where a decree ordered a sale of property, the description must be perfect in itself, and could not be aided by any other writing, though expressly referred to therein. Thus, where a decree of foreclosure ordered the sale of all that part of a certain rancho situate in the county of Santa Clara, state of California, called Santa Rita, described in the three following deeds, to wit (here the deeds were referred to by giving their dates, the names of the parties, and the dates and books and pages of their record), the sale, in pursuance of such decree, was adjudged void.<sup>78</sup> The same result followed a sale made by the guardian of certain minors, under an order of sale in which the property to be sold was described as "twenty and one-half acres of the Rancho La Golita, being the share of a tract of thirty-one acres allotted to said minors by a decree of the district court of Santa Barbara county, in a suit in partition, wherein the guardian herein and mother of said minors was plaintiff, and said minors were defendants."<sup>79</sup> Probably the descriptive words in a decree directing a sale of real property, or of a deed undertaking to convey it, must so refer to any other writing necessary to the understanding of the deed that no search is essential to enable intending bidders to determine what ought to be sold, or an officer executing a writ of assistance to know of what he should deliver possession under the deed. Hence, a conveyance of a designated tract of land, except such parts thereof as had been laid out in town lots by J. R., and by him sold and conveyed before a specified date, was held to be

<sup>78</sup> Crosby v. Dowd, 61 Cal. 557.

<sup>79</sup> Hill v. Wall, 66 Cal. 130.

insufficient and void.<sup>80</sup> Generally, however, a sheriff's deed may refer to other writings for the purposes of description to the same extent as any other conveyance, and the California decisions, in so far as they indicate the contrary, have been overruled.<sup>81</sup>

• § 331. **The Acknowledgment.**—Deeds are usually acknowledged by the persons by whom they are executed before some officer authorized by law to take such acknowledgments and grant certificates thereof. Under most statutes the acknowledgment is not essential to the execution of the deed, but is designed to furnish available evidence of such execution, and to entitle the deed to record, so as to impart notice to subsequent purchasers and encumbrancers under the grantor. In most states there is no difference, in this respect, between a sheriff's deed and one executed by a person in his private capacity. Hence, a deed made in pursuance of an execution sale is not invalid, because defectively acknowledged, nor because never acknowledged at all.<sup>82</sup> In some of the states, a sheriff's deed must be acknowledged. The acknowledgment is treated as part of the execution of the deed, and is as indispensable as its delivery.<sup>83</sup> In the states where this rule prevails, the acknowledgment is not made nor evidenced in the same manner as other deeds. It must be made in open court,<sup>84</sup> and can take place in no other

<sup>80</sup> *Bowen v. Wickersham*, 124 Ind. 404, 19 Am. St. Rep. 106.

<sup>81</sup> *De Sepulveda v. Baugh*, 74 Cal. 470, 5 Am. St. Rep. 455.

<sup>82</sup> *Doe v. Naylor*, 2 Blackf. 32; *Ogden v. Walters*, 12 Kan. 291; *Dixon v. Doe*, 5 Blackf. 106; *Hutchinson v. Kelly*, 5 Eng. 178; *Stephenson v. Thompson*, 13 Ill. 186; *In Matter of Smith and Others*, 4 Nev. 254.

<sup>83</sup> *Hall v. Benner*, 1 Penr. & W. 402, 21 Am. Dec. 394.

<sup>84</sup> *Murphy v. McCleary*, 3 Yeates, 405; *Ryan v. Carr*, 46 Mo. 483; *Adams v. Buchanan*, 49 Mo. 64.



court than the one prescribed by law.<sup>85</sup> In Pennsylvania it has been said that the acknowledgment must be treated as a judicial act, which could be proved only by the record of the court.<sup>86</sup> In Missouri, while the acknowledgment is required to be taken in court, and the clerk is to make minutes thereof, yet a defect in the minutes does not impair the effect of the certificate indorsed on the deed.<sup>87</sup> This certificate must be complete in itself, and cannot be assisted by the records of the court.<sup>88</sup> A deputy sheriff must act in the name of his principal. An acknowledgment by a deputy in his own name is therefore void,<sup>89</sup> but he may acknowledge a conveyance in the name and as the agent of his principal.<sup>90</sup>

In construing an acknowledgment of a sheriff's deed, that instrument may properly be regarded as a part thereof for the purpose of supplying defects therein. "In support of a certificate of acknowledgment, reference may properly be made to the language of the conveyance itself," and this rule is as applicable to sheriff's deeds as to other conveyances. Where an acknowledgment is authorized to be taken before the clerk of a court, who is ex-officio county recorder, and he signs such acknowledgment, adding after his name the word "recorder," it will, nevertheless, be sustained,

<sup>85</sup> McCormick v. Meason, 1 Serg. & R. 92; Dehaven's Appeal, 38 Pa. St. 373.

<sup>86</sup> Bellas v. McCarty, 10 Watts, 13. This case appears to be doubted in Robb v. Ankeny, 4 Watts & S. 128.

<sup>87</sup> Scruggs v. Scruggs, 41 Mo. 242.

<sup>88</sup> McClure v. McClurg, 53 Mo. 173; Samuels v. Shelton, 48 Mo. 444.

<sup>89</sup> Samuels v. Shelton, 48 Mo. 444; Evans v. Wilder, 7 Mo. 362. With respect to acknowledgment of sheriff's deeds in Missouri, see Bray v. Marshall, 75 Mo. 327; Lincoln v. Thompson, 75 Mo. 613; Agan v. Shannon, 103 Mo. 661.

<sup>90</sup> Terrell v. Martin, 64 Tex. 121.

if, from the language of the acknowledgment, it appears to have been taken before him as clerk of the court, and it has the seal of the court impressed thereon.<sup>91</sup>

**§ 332. Executing Second Deed where First is Defective.**—When a deed is from any cause so defective that it cannot transfer the title to the premises sold, the purchaser is not without remedy. In New York, when a sheriff's deed failed to embrace all the premises sold, the defendants in execution were restrained from asserting any claim to the omitted parts.<sup>92</sup> But we apprehend that this course of proceeding cannot be successfully defended. When a sheriff's deed is improperly or defectively executed, no action can be sustained in some of the states to correct or reform the deed. The only remedy is to procure a new deed.<sup>93</sup> Certainly a purchaser at execution sale is entitled to a conveyance in pursuance of and commensurate with his purchase. If a deed is given to him, which, for any cause, is void, or incorrect, he is entitled to another

<sup>91</sup> *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618.

<sup>92</sup> *De Riemer v. Cantillon*, 4 Johns. Ch. 85.

<sup>93</sup> *Ware v. Johnson*, 55 Mo. 500; *Bright v. Boyd*, 1 Story, 486; *Moreau v. Detchemendy*, 18 Mo. 522; *Moreau v. Branham*, 27 Mo. 351; *Hall v. Klepzig*, 99 Mo. 83. The principle upon which these decisions rest is, that while equity may interpose to aid the defective execution of a power created by private parties, it will not so interpose where the power is created by statute. The soundness of the general rule is well sustained by the authorities. *Story's Eq. Jur.*, §§ 96, 177; *Bright v. Boyd*, 1 Story, 486; *Allen v. Moss*, 27 Mo. 354; *Abernathy v. Dennis*, 49 Mo. 468. The only question is, whether the rule extends to deeds made in pursuance of execution and judicial sales. In New York a sheriff's deed may, it seems, be reformed in equity. *Bartlett v. Judd*, 21 N. Y. 200, 78 Am. Dec. 181. In Indiana a mistake in description may probably be corrected. *Johns v. De Rome*, 5 Blackf. 421. But the rule is otherwise where the mistake runs through the proceedings anterior to the deed. *Mahan v. Reeve*, 6 Blackf. 215; *Rogers v. Abbott*, 37 Ind. 138.

—one which shall be valid in form, and conformable to the facts of the case.<sup>94</sup> The duty of making a correct and appropriate conveyance, which rests upon the officer making the sale, is not discharged by an inadequate deed, or one which vests part only of the property sold, and he may, therefore, proceed in the discharge of that duty, though he has before attempted to discharge it, and may, hence, continue to execute conveyances until his powers have been exercised to the extent to which he was, by virtue of the sale, authorized to exercise them.<sup>95</sup>

A purchaser may, we think, though he has accepted an inadequate or incorrect deed, be deemed entitled to the same remedies to procure a second or perfect deed to which he was entitled in the first instance, and before any conveyance to him had been attempted, and, because these remedies are ample, he may properly be denied relief in equity, at least, when his application to the court is for the purpose of perfecting the evidence of his title. If, however, an action should be brought against him to recover possession of property which he had purchased at an execution sale, and of which he had taken possession in reliance on such sale and a conveyance purporting to be executed thereunder, and he should, by cross-complaint or in the assertion of an equitable defense, plead the facts entitling him to a perfect conveyance, that would, doubtless, constitute an equitable defense, and authorize the court to deny relief to the plaintiff and to enjoin him from asserting his legal title, and, perhaps, to require

<sup>94</sup> *Lamb v. Sherman*, 19 Neb. 681; *Adams v. Thomas*, 6 Binn. 254; *Davis v. Evans*, 5 Ired. 525; *Thornton v. Miskimmon*, 48 Mo. 219; *Doe v. Miller*, 10 U. C. Q. B. 65.

<sup>95</sup> *Moody v. Hamilton*, 22 Fla. 298; *Kruse v. Wilson*, 79 Ill. 233.

it to be conveyed to the defendant. Certainly, the tendency of the courts is to grant relief in all cases where a conveyance executed in pursuance of an execution or judicial sale is found to be in any way defective, either by reforming the conveyance or by otherwise so decreeing that the possession of the purchaser shall not be disturbed, or, on the other hand, when the mistake is in his favor, by preventing him from taking advantage of it, or by so reforming his conveyance as to limit it by excluding therefrom any property improperly included therein.<sup>96</sup>

Under the statutes of North Carolina, a sheriff's deed does not pass the title until recorded. If it should, after execution and before its registration, be lost, an action may be sustained against the sheriff and the judgment debtor, in which the purchaser may recover judgment that the officer execute a deed in lieu of the one lost, and, also, for the possession of the land.<sup>97</sup> The power of courts of equity to correct mistakes in deeds made pursuant to execution and judicial sales is not universally denied. In New Jersey these deeds will be corrected for fraud or mistake in them as freely as voluntary conveyances.<sup>98</sup> Such is also the rule in Arkansas, New York,<sup>99</sup> Georgia, Kentucky, and Ohio.<sup>100</sup> Though the courts of Missouri have refused to interpose for the purpose of perfecting the title of purchasers at execution sales, they have granted relief to a purchaser at an administrator's

<sup>96</sup> *Thomas v. Dockins*, 75 Ga. 347; *Miller v. Craig*, 83 Ky. 623, 4 Am. St. Rep. 179; *Stiles v. Wiedner*, 35 Ohio St. 555.

<sup>97</sup> *McMillan v. Edwards*, 75 N. C. 81.

<sup>98</sup> *Zingsem v. Kidd*, 29 N. J. Eq. 516.

<sup>99</sup> *Steward v. Pettigrew*, 28 Ark. 372; *Bartlett v. Judd*, 21 N. Y. 200, 78 Am. Dec. 131; *Colle v. Jamison*, 13 Nat. Bank. Reg. 4.

<sup>100</sup> *Thomas v. Dockins*, 75 Ga. 347; *Miller v. Craig*, 83 Ky. 623, 4 Am. St. Rep. 179; *Stiles v. Wiedner*, 35 Ohio St. 555.

sale, whose deed was imperfect, by maintaining that the facts entitling him to a proper conveyance constituted a complete equitable defense to any action against him to recover the property.<sup>101</sup> If the mistake is merely in the deed, we see no reason for denying the power of equity to reform or correct it, unless it be because the party has an adequate remedy by proceedings to compel the officer making the sale to execute a proper and correct conveyance, such as the purchaser was entitled to in the first instance. The mistake may have been at some point anterior to the execution of the deed. The decree or order of sale may have described different property from that intended. If so, the deed cannot be reformed, for, if reformed, it would be without support; for the only authority to sell was confined to the property described in the judgment.<sup>102</sup> Besides, it would ordinarily be unjust and inequitable to vary the terms of an involuntary sale, so as to include property not authorized to be sold, nor advertised for sale, because a sale, under such circumstances, must generally be for an inadequate price. No prudent man would care to assume the risk and expense of proceedings to correct the mistake. But if there is a mistaken description in a mortgage, through which it includes lands not belonging to the mortgagor, and this mistake is carried through the foreclosure proceedings and sale, the plaintiff may obtain relief by a new action to reform the mortgage and to foreclose it as reformed.<sup>103</sup>

<sup>101</sup> Grayson v. Weddle, 80 Mo. 39.

<sup>102</sup> Tatum v. Oroom, 60 Ark. 487; Miller v. Kolb, 47 Ind. 220; Rogers v. Abbott, 37 Ind. 138; Lewis v. Owen, 64 Ind. 446; Dickey v. Beatty, 14 Ohio St. 389.

<sup>103</sup> Conyers v. Mericles, 75 Ind. 443; Davenport v. Sovll, 6 Ohio St. 459; Strang v. Beach, 11 Ohio St. 283, 78 Am. Dec. 308.

The time within which a sheriff's deed may be reformed or perfected has been but little considered. Ordinarily, one in possession of property may maintain a suit, irrespective of the lapse of time, to remove a cloud from, or to quiet his title, or to obtain written evidence of title, or to reform the conveyance under which he claims. While he is in possession, and until a prescriptive right to the possession has been created against him by a holding adverse to him, he retains the right to maintain any appropriate suit for the purposes hereinbefore stated.<sup>104</sup> We know of no reason why the same rule should not be applied to sheriff's deeds. A purchaser, after the expiration of the time for redemption, has a complete equity and an absolute right to be invested with the legal title by the execution of the appropriate conveyance. If he takes and holds possession of the property, his right to a conveyance is a continuing right, and may be enforced at any time. In Illinois, the time within which a sheriff's deed may issue has been limited by statute, and it has, hence, been held that an officer has no power to execute a second and correctory conveyance after the expiration of the time within which the original might lawfully have been executed.<sup>105</sup>

**§ 333. The Effect of Deeds by Relation.**—While the title of the defendant is not, in a vast majority of the states, divested until the execution of a conveyance to the purchaser, this conveyance, when made, must, for some purposes, be given effect as though executed at

<sup>104</sup> *Tate v. Pensacola G. etc. Co.*, 37 Fla. 439, 53 Am. St. Rep. 251; *Barbour v. Whitlock*, 5 Monr. 180; *Pomeroy on Contracts*, § 404.

<sup>105</sup> *Ryhiner v. Frank*, 105 Ill. 326; *Parker v. Shannon*, 137 Ill. 376.

some period antecedent to its date. The relation of deeds made in pursuance of sales under execution is very frequently spoken of in the reported cases; and yet about the only thing which we conceive to be well settled in regard to the doctrine of relation is, that each deed must be given such an effect as will preserve and make effectual the lien under which the execution sale was made. A lien is sometimes created by attachment, sometimes by the docketing of a judgment, sometimes by the issue of execution, and sometimes by a levy. But however created, it takes precedence over subsequent liens and transfers; and a sale and conveyance based upon such lien transfer to the purchaser all the title which the defendant held when such original lien attached. To this extent the deed, when executed, takes effect by relation, and must be treated as though made on the day when the lien was created. The decisions on this subject are consistent and numerous.<sup>106</sup>

<sup>106</sup> *Stotts v. Brookfield*, 55 Ark. 307; *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108; *Riley v. Vance*, 97 Cal. 203; *Robinson v. Thornton*, 102 Cal. 675; *Greer v. Wintersmith*, 85 Ky. 516, 7 Am. St. Rep. 613; *First N. B. v. Lienallen (Id.)*, 39 Pac. 1108; *Parker v. Prescott*, 87 Me. 444; *Dwyer v. Rippetoe*, 72 Tex. 520; *Beebe v. United States*, 161 U. S. 104; *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726; *Ferguson v. Miles*, 3 Gilm. 358, 44 Am. Dec. 702; *Wilhelm v. Humphries*, 97 Ind. 520; *Ryhiner v. Frank*, 105 Ill. 326; *Fehley v. Barr*, 66 Pa. St. 196; *Bank of Missouri v. Wells*, 12 Mo. 361, 51 Am. Dec. 163; *Shirk v. Wilson*, 13 Ind. 129; *Cockey v. Milne*, 16 Md. 200; *Lackey v. Seibert*, 23 Mo. 85; *Reichert v. McClure*, 23 Ill. 516; *McClure v. Engelhardt*, 17 Ill. 47; *McCormick v. McMurtrie*, 4 Watts, 192; *Kirk v. Vonberg*, 34 Ill. 440; *Kane v. Mackin*, 9 Smedes & M. 387; *Kingman v. Glover*, 3 Rich. 27, 45 Am. Dec. 756; *Miles v. Wilson*, 3 Harr. (Del.) 383; *Robinson v. Robinson*, 3 Harr. 391; *Million v. Riley*, 1 Dana, 359, 25 Am. Dec. 149; *Jackson v. Dickenson*, 15 Johns. 309, 8 Am. Dec. 236; *Stephens v. Illinois M. F. Ins. Co.*, 43 Ill. 327; *Smith v. Allen*, 1 Blackf. 22; *Hutchings v. Ebeler*, 46 Cal. 557; *Doe v. Horn*, 1 Ind. 363, 50 Am. Dec. 470; *Bell v. Hall*, 4 G. Greene, 68; *Clement v. Garland*, 53 Me. 427; *Heywood v. Hildreth*, 9 Mass. 393; *Brown v. Maine Bank*, 11 Mass. 153; *Leach v. Koenig*,

Hence, if a lease be made after the lien is created, the conveyance gives the purchaser the right to disregard the lease.<sup>107</sup> No disclaimer of title, attornment to a stranger, or other act or agreement of the judgment debtor, made after the lien attached, can be given in evidence against the purchaser, because, by operation of the doctrine of relation, the purchaser must be regarded as the owner from the date of such lien, and the act or declaration of the judgment debtor as that of a stranger to the title.<sup>108</sup> The necessity and justice of this rule are obvious. If it did not prevail, the debtor might make worthless a lien created by himself, by doing some act, or making some declaration, to impair or destroy his title.

The deed need not disclose the date to which the title will relate, nor show whether or not it is supported by

55 Mo. 451; *Hall v. Hoxie*, 3 Met. 251; *Strain v. Murphy*, 49 Mo. 337; *Shumate v. Reavis*, 49 Mo. 333; *Howard v. Daniels*, 2 N. H. 137; *Davidson v. Frew*, 3 Dev. 3, 22 Am. Dec. 708; *Hoke v. Henderson*, 3 Dev. 12; *Pickett v. Pickett*, 3 Dev. 6; *Dobson v. Murphy*, 1 Dev. & B. 586; *Testerman v. Poe*, 2 Dev. & B. 103; *Boyd v. Longworth*, 11 Ohio, 235; *Parker v. Swan*, 1 Humph. 80, 34 Am. Dec. 619; *Ellar v. Ray*, 2 Hawks, 568; *Wood v. Turner*, 7 Humph. 517. A purchaser at an execution sale cannot be prejudiced by any admissions or declarations concerning the title made by the judgment debtor after the lien had attached. *Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339. If, however, one entitled to a lien does not pursue it, as where a mortgagee sues at law and there recovers judgment for his debt, and issues an ordinary fieri facias thereon, the title resulting from a sale thereunder does not relate to the date of the mortgage, but only to the date of the judgment or execution lien. *Ker v. Evershed*, 41 La. An. 15.

<sup>107</sup> *Miller v. Wilson*, 32 Md. 297; *Wilson v. Davol*, 5 Bosw. 619. A sale under a lien subsequent to a lease gives the purchaser the right to the rents after he receives his title. *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364; *Bank of Pennsylvania v. Wise*, 3 Watts, 394; *Hart v. Israel*, 2 Browne, 22; *Braddee v. Wiley*, 10 Watts, 362.

<sup>108</sup> *Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339; *Hays v. Wilstach*, 82 Ind. 13; *Miller v. Wilson*, 32 Md. 297; *Wall v. Staley*, 91 Pa. St. 27.



an antecedent lien. If it makes recitals upon this subject, they neither augment nor diminish its effect. Hence, though the deed purports to convey the interest of the defendant at a specified date, it may operate as of an earlier date at which the lien attached to the defendant's title.<sup>109</sup>

If an execution sale is not supported by any lien, as where a writ has not been levied, or has been levied upon the property before the defendant had any interest therein to which a lien could attach, the relation of the conveyance must be to the date of the sale, and, hence, it must transfer whatsoever title the defendant had on that day, whether he had any title prior thereto or not.<sup>110</sup>

Knowing that a deed, by relation, destroys all alienations and encumbrances made subsequent to the attaching of the original lien, to enforce which the execution sale was made, does not enable us to determine in what other instances the law of relation will be applied. Where a purchaser took possession before the expiration of the time for redemption, it was held that his deed, when afterward executed, took effect by relation, and annexed the title to the possession,<sup>111</sup> and shielded him from prosecution as a trespasser.<sup>112</sup> In New York and Missouri, a sheriff's deed, made pending an action of ejectment, so operates by relation that it may be given in evidence, for the purpose of proving that the grantee therein held the title at the institution of the suit.<sup>113</sup> In North Carolina, the courts have

<sup>109</sup> *Owen v. Baker*, 129 Ind. 407, 20 Am. St. Rep. 618.

<sup>110</sup> *Frink v. Roe*, 70 Cal. 296; *Willis v. Pounds*, 6 Tex. Civ. App. 512; *Morse v. Hackensack S. B.*, 47 N. J. Eq. 279.

<sup>111</sup> *Richardson v. Thornton*, 7 Jones, 458.

<sup>112</sup> *Kingman v. Glover*, 3 Rich. 27, 45 Am. Dec. 756.

<sup>113</sup> *Jackson v. Ramsay*, 3 Cow. 75, 15 Am. Dec. 242; *Crowley v. Wallace*, 12 Mo. 143; *Winston v. Affalter*, 49 Mo. 263; *Nellis v. La-*

refused to be governed by the decisions of New York and Missouri, because they regarded those decisions as carrying the law of relation to an unnecessary and unreasonable length.<sup>114</sup> The execution of a sheriff's deed cannot, by relation, enable the grantee to sustain actions of trespass for injuries done to the lands or improvements after the day of the sale.<sup>115</sup> This is because an action of trespass lies only for injuries done to the possession. The purchaser is not in such cases without remedy. He can sustain an action in the nature of waste.<sup>116</sup> In Minnesota, however, trover may be sustained against one who, having cut and removed logs from the premises after the sale, and while defendant retained a right of redemption, refused to deliver them to the purchaser after his title had become absolute. While the court did not refer to the doctrine of relation, its reasoning was an affirmation of that doctrine, and was to the effect that the sale necessarily vested in the purchaser the title to the land, and everything thereon pertaining to the realty, as it existed at the time of the sale.<sup>117</sup> In Wisconsin, the purchaser at an execution sale recovering the property in ejectment is not entitled to mesne profits accruing before the execution of his deed;<sup>118</sup> and the same principle is clearly recognized and enforced in Michigan and

throp, 22 Wend. 121, 84 Am. Dec. 285. Similar views are expressed in *Wallace v. Lawrence*, 1 Wash. C. C. 503, but repudiated in *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256; *Presnell v. Ramsour*, 8 Ired. 505.

<sup>114</sup> *Davis v. Evans*, 5 Ired. 525; *Richardson v. Thornton*, 7 Jones, 458.

<sup>115</sup> *Presnell v. Ramsour*, 8 Ired. 505; *McMillan v. Hafley*, Car. Law Rep. 89.

<sup>116</sup> *Thomas v. Crofut*, 14 N. Y. 474.

<sup>117</sup> *Whitney v. Huntington*, 34 Minn. 458.

<sup>118</sup> *Swift v. Agnes*, 33 Wis. 228.

Pennsylvania.<sup>119</sup> If a sale is made under a decree foreclosing a mortgage, the deed takes effect by relation, and transfers all fixtures placed on the premises after the execution of the mortgage, and remaining thereon at the date of the sale; but it does not confer upon the purchaser the right to recover fixtures removed before the sale,<sup>120</sup> but he may recover their value to the extent necessary to satisfy any deficiency remaining after foreclosure.<sup>120a</sup>

The relation of the sheriff's deed may have some relevancy in connection with the question whether the statute of limitations has operated against the purchaser. The doctrine of relation is never indulged except for the advancement of right and justice.<sup>121</sup> It

<sup>119</sup> *Scheerer v. Stanley*, 2 Rawle, 276; *Thomas v. Connell*, 5 Pa. St. 13; *Hawk v. Stouch*, 5 Serg. & R. 157. "The sheriff's deed relates back to the levy for the purpose of protecting the title against any conveyance or encumbrance by the judgment debtor, and to the ending of the equity of redemption, for the purpose of protecting the purchaser in the possession, when proceeded against by an action of ejectment; or for the purpose of supporting a conveyance executed by the purchaser or his assignee. It does not follow, however, as a necessary conclusion, that such relation entitles the purchaser or his assignee to compensation for the use and occupation of the premises before his own title is completed. No case has been cited or found establishing such a principle. The proceeding by which the judgment debtor is to be divested of his property is a statutory one, and until that proceeding has been completed, so as to vest the title, and with it the right to the possession in another, he may lawfully remain in the use and occupation of the premises without being accountable. Upon the expiration of the time limited for redeeming, if the premises are not redeemed, the purchaser or person holding his title has a right to have the sale completed by the execution of a deed of conveyance which will give him the right of possession; but until such deed is executed, or he becomes in some other way vested with the legal title, he has no right to demand, and cannot recover, the possession; and not having been entitled to the possession, he has no claim on account of the use and occupation." *Whipple v. Farrar*, 3 Mich. 436, 64 Am. Dec. 99.

<sup>120</sup> *Sands v. Pfeiffer*, 10 Cal. 258; *Hill v. Gwinn*, 51 Cal. 47.

<sup>120a</sup> *Lavenson v. Standard Soap Co.*, 80 Cal. 245, 13 Am. St. Rep. 147.

<sup>121</sup> Note to *Jackson v. Ramsay*, 15 Am. Dec. 246.

will, therefore, certainly not be applied against a purchaser for the purpose of giving operation to the statute of limitations, at a time when he was not yet entitled to a conveyance. But he may postpone the taking out of his conveyance for years after his right thereto has become absolute, and during such time there may be an adverse possession of the property. Can the purchaser by failing to take his deed postpone the inception of his cause of action, and thus, in effect, postpone the operation of the statute of limitations? The answers to this question are infrequent and contradictory. It has been said: "It would be absurd to suppose that the mere delay or negligence of the purchaser in procuring a deed from the sheriff could have the effect of preventing the bar of the statute from attaching in favor of the adverse possessor."<sup>122</sup> But it would be still more absurd to hold that the statute of limitations is in operation, unless it can be affirmed that the purchaser must, either by the doctrine of relation or otherwise, be deemed to be the holder of the legal title, or of a right to recover the possession, from the time he was entitled to a deed. The majority of the cases affirm the very reverse of this. Hence, it is difficult to resist the conclusion which has been announced in one state, that there is nothing to put the statute of limitations in motion, until by the execution and delivery of the sheriff's deed the purchaser is vested with a right of possession, and, therefore, with a cause of action.<sup>123</sup> This principle, while its existence is recognized, will be applied only in actions brought by the purchaser against the defendant in execution and

<sup>122</sup> *Keaton v. Thomasson's Lessee*, 2 Swan, 138, 58 Am. Dec. 55; *Cowles v. Coffey*, 88 N. C. 340.

<sup>123</sup> *Jefferson v. Wendt*, 51 Cal. 575; 4 Cent. L. J. 197; *Leonard v. Flynn*, 89 Cal. 535, 23 Am. St. Rep. 501.

his successors in interest. They have the right to remain in possession until the execution of the sheriff's deed. Hence, no cause of action exists against them in favor of the purchaser before that deed issues, and no statute of limitations can be operating against him because of his failure to assert a right of action which he does not have. If one is holding possession adversely to the title of the defendant in execution, the statute of limitations is not affected by the sale of such title under execution, and the purchaser cannot prolong his right to sue by failing to take out his deed, nor is it extended by the fact of the sale and that a period must elapse thereafter before the purchaser is entitled to a conveyance.<sup>124</sup>

§ 334. **Contradicting Sheriffs' Deeds.**—In a subsequent portion of this work we shall treat of the effect of returns made by sheriffs and constables, showing the various acts done by them in obedience to writs of execution placed in their hands for service. We shall there state that such returns, when collaterally questioned, must be treated as conclusive between the parties to the suit, and all persons in privity with them, and as *prima facie* evidence as against all other persons.<sup>125</sup> The recitals made in sheriffs' deeds ought to be of as conclusive a character as those found in sheriffs' returns. "The power to sell, to recite and to deed, having its origin in the judgment and execution, must be proved by a production of both under the rule of best evidence; but when the power has been so proved, the sheriff becomes, so to speak, the accredited historian of his acts under it. He may narrate his proceedings on the back of the execution, and return it into court, and, with or

<sup>124</sup> Robinson v. Thornton, 102 Cal. 675.

<sup>125</sup> See §§ 363-365.

without that, he may issue a certificate to the purchaser, and both the certificate and return, if made, would, within the limits of the authority delegated to him, be evidence against all persons of the facts stated or recited therein. It is also the official duty of the sheriff to make a like statement or recital in his deed, and it follows that a recital so made must be entitled to the same effect, as an instrument of evidence, as all the authorities concede to be due to an official return on execution, if one be made."<sup>126</sup> If there be a valid judgment and execution, giving the officer power to sell and convey, and the time for redemption has expired, the defendant is bound by the officer's conveyance as much as if it were made by himself, and he will not be permitted in any collateral way to impeach or avoid it.<sup>127</sup> The deed is also conclusive on the plaintiff, the grantee, and all persons claiming title under it.<sup>128</sup> As against strangers, it is not conclusive, except in circumstances where the sheriff's return in the same case would be conclusive.<sup>129</sup> In New York, equity has jurisdiction to reform a sheriff's deed, and may exercise its authority at the instance of a defendant as well as of a plaintiff. Hence, a de-

<sup>126</sup> *Hihn v. Peck*, 30 Cal. 288.

<sup>127</sup> *Blood v. Light*, 38 Cal. 658, 99 Am. Dec. 441; *Kelley v. Desmond*, 63 Cal. 519; *Cooper v. Galbraith*, 3 Wash. C. C. 550; *Jackson v. Vanderheyden*, 17 Johns. 167, 8 Am. Dec. 378; *Jackson v. Roberts*, 7 Wend. 83, and 11 Wend. 422; *Den v. Winans*, 2 Green (N. J.) 6; *Dodge v. Walley*, 22 Cal. 225, 83 Am. Dec. 61; *Jackson v. Sternberg*, 20 Johns. 49; *Love v. Powell*, 5 Ala. 58; *McDonald v. Badger*, 23 Cal. 393; *Ingersoll v. Truebody*, 40 Cal. 611; *Donahue v. McNulty*, 24 Cal. 411; *Smith v. Houston*, 16 Ala. 111; *Pollard v. Cocke*, 19 Ala. 188; *Plant v. Anderson*, 16 Fed. Rep. 914.

<sup>128</sup> *Zabriskie v. Mead*, 2 Nev. 285; *French v. Edwards*, 13 Wall. 506.

<sup>129</sup> *Zabriskie v. Mead*, 2 Nev. 285; *French v. Edwards*, 13 Wall. 506; *Donahue v. McNulty*, 24 Cal. 411.

fendant was in that state able to defeat an action of ejectment by pleading and proving that the land in controversy, though embraced in the sheriff's deed, was in fact excepted from the sale.<sup>180</sup>

<sup>180</sup> Bartlett v. Judd, 21 N. Y. 200, 78 Am. Dec. 181.

## CHAPTER XXV.

## THE PURCHASER'S TITLE, RIGHTS, AND REMEDIES.

- § 335. Purchaser obtains defendant's title, and none other.
- § 336. The effect of secret transfers and equities.
- § 337. The effect of agreements to hold for the benefit of defendant.
- § 338. The interest of the purchaser as against prior liens.
- § 339. The general effect of irregularities.
- § 340. The effect of irregularities where plaintiff or his attorney purchased.
- § 341. The purchaser's title is not affected by the officer's return.
- § 342. The effect of fraudulent practices in which the purchaser participated, or of which he had notice.
- § 343. The effect of secret vices.
- § 344. Whether the whole consideration must be paid to protect a purchaser from secret vices.
- § 345. The effect of a reversal, a stranger having purchased.
- § 346. How restitution is to be enforced where a stranger purchased.
- § 347. The effect of a reversal when plaintiff or his attorney has purchased.
- § 348. The effect of transfers of shares in corporations.
- § 349. The purchaser's rights to rents and profits before conveyance.
- § 349 a. The purchaser's remedy for waste.
- § 350. The purchaser's right to possession, and the remedies for its enforcement.
- § 351. What defenses may be asserted against the purchaser.
- § 352. The purchaser's remedy for a failure of title.

§ 335. **Purchaser Obtains Defendant's Title, and None Other.**—Judgment and execution liens attach to the defendant's real, instead of his apparent, interest in property.<sup>1</sup> It follows from this that the sale made under such a lien can ordinarily transfer no interest beyond that in fact held by the defendant when the lien attached, or acquired by him subsequently thereto, and

<sup>1</sup> Freeman on Judgments, §§ 356, 357, and ante, § 195.



before the sale.<sup>3</sup> It is the duty of the purchaser to satisfy himself, prior to the purchase, respecting the title of the defendant and the sufficiency of the proceedings to transfer it, for the maxim of *caveat emptor* is unquestionably applicable both to judicial and to execution sales.<sup>3</sup> The title acquired by a purchaser, even when the proceedings are valid, is that only to which he would succeed by a conveyance from the defendant in the writ made either at the time of the sale where it is not supported by any antecedent lien, otherwise at the date of the attaching of such lien.<sup>4</sup> If one not a party to the suit has an interest in the property, an execution sale will not defeat it,<sup>5</sup> though such property was levied upon while in his possession.<sup>6</sup>

In England, sales in market overt gave the purchaser a good title, irrespective of any question concerning the prior ownership of the property. Many efforts have been made to have the courts declare the

<sup>3</sup> *Stevens v. King*, 21 Ala. 429; *O'Neal v. Wilson*, 21 Ala. 288; *Trepow v. Buse*, 10 Kan. 170; *Taylor v. Eckford*, 11 Smedes & M. 21; *Flynn v. Williams*, 1 Ired. 509; *Rutherford v. Green*, 2 Ired. Eq. 122; *Carney v. Emmons*, 9 Wis. 114.

<sup>3</sup> *Lewark v. Carter*, 117 Ind. 206, 10 Am. St. Rep. 40; *Greer v. Wintersmith*, 85 Ky. 516, 7 Am. St. Rep. 613; *Williams v. Glenn*, 87 Ky. 87, 12 Am. St. Rep. 461; *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560; *Motley v. Motley*, 53 Neb. 875, 68 Am. St. Rep. 608; *Peterborough S. B. v. Pierce*, 54 Neb. 712; *Stearns v. Edson*, 63 Vt. 259, 25 Am. St. Rep. 758; *Smith v. Wortham*, 82 Va. 937; *Redd v. Dyer*, 83 Va. 331, 5 Am. St. Rep. 272; *The Little*, 42 Fed. Rep. 237.

<sup>4</sup> *Cotton v. Carlisle*, 85 Ala. 175, 7 Am. St. Rep. 29; *Robson v. Rawlins*, 79 Ga. 354; *Thain v. Rudisill*, 126 Ind. 272; *Hentig v. Pipher*, 58 Kan. 788; *Horne v. Nugent*, 74 Miss. 102; *Butler v. Fitzgerald*, 43 Neb. 192, 47 Am. St. Rep. 741; *Threadgill v. Redwine*, 97 N. C. 241; *Miller v. Baker*, 160 Pa. St. 172; *McAfee v. McAfee*, 28 S. C. 218; *Washburn v. Green*, 133 U. S. 30.

<sup>5</sup> *Hexter v. Schneider*, 14 Or. 184; *Andrews v. Key*, 77 Tex. 35; *United L. T. Co. v. Boston S. etc. Co.*, 147 U. S. 431.

<sup>6</sup> *Pekin M. Co. v. Kennedy*, 81 Cal. 356; *Haberling v. Jagger*, 47 Minn. 70, 28 Am. St. Rep. 331.

doctrine of sales in market overt applicable to the sales of chattels under execution. But all these efforts have been without success. With unvarying unanimity the rule has been sustained that a sale of chattels, under a writ against one person, can have no operation upon the title of another person. Hence, the purchaser is always liable to a suit brought by the true owner.<sup>7</sup> There may be instances in which the judgment creditor induces a purchase by misrepresentations, and thereby furnishes a cause on which the purchaser may successfully seek a release from his bid;<sup>8</sup> but in ordinary circumstances there is no warranty<sup>9</sup> of title, nor has the officer any authority whatever, in his official capacity, to make any warranty or any representations whatsoever, concerning the title.<sup>10</sup> Generally, a purchaser acquires all the title which the defendant had at the date of the sale or at the time to which the deed by operation of law relates,<sup>11</sup> including such covenants as pass with the land,<sup>12</sup> and the right to compel specific per-

<sup>7</sup> *McClanahan v. Barrow*, 27 Miss. 664; *Chambers v. Lewis*, 28 N. Y. 454; 16 Abb. Pr. 433; *Bryant v. Whitchee*, 52 N. H. 158; *Farrant v. Thompson*, 5 Barn. & Ald. 826; *Buffum v. Deane*, 8 Cush. 41; *Shaw v. Tunbridge*, 2 W. Black. 1064; *Stone v. Ebberly*, 1 Bay. 317; *Champney v. Smith*, 15 Gray, 512; *Shearick v. Huber*, 6 Binn. 2; *Symonds v. Hall*, 37 Me. 354, 59 Am. Dec. 53; *Griffith v. Fowler*, 18 Vt. 390; *Austin v. Tilden*, 14 Vt. 327; *Homesley v. Hogue*, 4 Jones, 481; *Coombs v. Gorden*, 59 Me. 111; *Williams v. Miller*, 16 Conn. 144; *Bartholomew v. Warren*, 32 Conn. 102, 85 Am. Dec. 251.

<sup>8</sup> *Webster v. Haworth*, 8 Cal. 21, 68 Am. Dec. 287.

<sup>9</sup> *Bassett v. Lockard*, 60 Ill. 164.

<sup>10</sup> *Ball v. Pratt*, 36 Barb. 402; *The Monte Allegre*, 9 Wheat. 645; *Puckett v. United States*, 4 Am. Law Reg. 459.

<sup>11</sup> *Morris v. Rogers*, 104 Ga. 705; *Curriden v. St. Paul etc. R. Co.*, 50 Minn. 454; *Orr v. Broad*, 52 Neb. 490.

<sup>12</sup> *Spencer's Case*, 5 Coke, 17; *Redwine v. Brown*, 10 Ga. 320; *White v. Whitney*, 3 Met. 81; *Carter v. Denman*, 3 Zab. 260; *Markland v. Crump*, 1 Dev. & B. 94, 27 Am. Dec. 230; *Lewis v. Cook*, 13 Ired. 196; *Sweet v. Green*, 1 Paige, 473, 19 Am. Dec. 442; *Kellogg v. Wood*, 4 Paige, 578; *Leport v. Todd*, 32 N. J. L. 124; *McCrady v. Brisbane*, 1 Nott & McC. 104.

formance.<sup>13</sup> He also becomes subject, to the same extent as if he had received a conveyance from the defendant in person, to the obligations attaching to the holder of the estate conveyed; and if it be an estate for years or for life, he must accept the burdens thereof and submit to, and perform, the conditions under which it was held by the defendant in execution.<sup>14</sup>

The rule that a purchaser succeeds to the title and interest of the defendant in execution is subject to some apparent exceptions, which may all, we believe, be resolved into classes, viz.: 1. Sales in which the property sold or some interest therein is not subject to execution; 2. Sales in which the defendant has some interest which either has not been levied upon, or is not subject to levy and sale in the mode employed; and 3. Sales which do not purport to be of all the defendant's interest, and which, on the other hand, either embrace a part only, or are made subject to some supposed writ or lien. In the first class may be included all property not subject to execution in any case, or, if so subject in some cases, exempt in the particular case under consideration. In many of the states, equitable interests are not subject to execution, and therefore, in them an execution sale against a defendant who has an equitable interest only must be wholly inoperative.<sup>15</sup> But in those states wherein an execution sale may transfer the legal title held by a trustee,<sup>16</sup> it never

<sup>13</sup> Morgan v. Bouse, 53 Mo. 219.

<sup>14</sup> Murch v. Smith M. Co., 47 N. J. Eq. 193; Aderhold v. Oil Well S. Co., 158 Pa. St. 401.

<sup>15</sup> Burrows v. Parker, 31 Or. 57, 65 Am. St. Rep. 812.

<sup>16</sup> Smith v. Lookabill, 71 N. C. 25; Giles v. Palmer, 4 Jones, 386, 69 Am. Dec. 756. The purchaser acquires every right and interest of the defendant. Hence the former may successfully resist a mortgage made by the latter on the property purchased, and which is

transfers the interest of the beneficiary,<sup>17</sup> and the better opinion is that, unless the trustee has a beneficial interest in the subject of the trust, his estate is not subject to execution, and, therefore, a levy and sale, under a writ against him, transfer no title whatsoever.<sup>18</sup> Though the property sold is of a class ordinarily subject to execution, the defendant may be entitled to hold it as exempt, in which case its sale under execution does not impair his title, unless he has waived his right of exemption.<sup>19</sup> As instances of the second class may be mentioned a sale of personal property not present at the sale, or a sale under a writ against two or more defendants, when the interest of only one was levied upon,<sup>20</sup> or when one of them held a lien by way of mortgage on the property sold.<sup>21</sup> In the last case the sale would not affect the lien, because it could only be transferred by some proceeding adapted to reaching the debt, of which it was a mere incident. Cases of the third class are illustrated by sales made subject to a designated lien or condition, in which the purchaser is not at liberty to contest the lien or disregard the condition,<sup>22</sup> or to a specified estate or interest, though the defendant was possessed thereof, and it might have been levied upon and sold under the writ.<sup>23</sup>

An execution sale, while it relates back to the tainted with usury. *Dix v. Van Wyck*, 2 Hill, 522; *Mason v. Lord*, 40 N. Y. 476.

<sup>17</sup> *Morrison v. Herrington*, 120 Mo. 665; *Hood Camp v. De Cordova*, 92 Tex. 202.

<sup>18</sup> *Nugent v. Priebatsch*, 61 Miss. 402; ante, §§ 173, 181; *Hood Camp v. De Cordova*, 92 Tex. 202.

<sup>19</sup> Ante, § 215.

<sup>20</sup> *Frederick v. St. R. & Ft. S. R. R.*, 82 Mo. 402.

<sup>21</sup> *Rahm v. Butterfield*, 82 Ind. 163.

<sup>22</sup> *Cable v. Byrne*, 38 Minn. 534, 8 Am. St. Rep. 696.

<sup>23</sup> *Carrington v. Richardson*, 79 Ala. 101.

tion of the lien, is not confined to the debtor's title at that time. It includes, in addition thereto, all title held by the debtor at the moment of the sale, though acquired subsequently to the levy.<sup>24</sup> But if the defendant acquires title subsequently to the sale, this does not inure to the benefit of the purchaser;<sup>25</sup> but it is otherwise with fixtures attached to the land after the sale, for by such attachment they become a part of the realty and pass with it on the execution of the sheriff's deed.<sup>26</sup> As an execution sale and a conveyance made in pursuance thereto necessarily have as great an effect as a quitclaim deed of the defendant in the writ, they must be operative to pass an after-acquired title when his quitclaim deed would have that effect. Strictly speaking, neither a quitclaim deed nor a transfer under execution operates upon title subsequently acquired by the grantor or the defendant in the writ. The acquisition of a title is often the result of several successive steps taken at different, and, sometimes, distant periods of time, as where a person pursues the measures and makes the payments essential to obtain title to land from the state or national government, and afterward receives a patent therefor. This, when issued, operates by relation to the first steps essential to its acquisition, and a conveyance, whether voluntary or involuntary, made by the patentee after taking that step, must be given effect, unless public policy or some express stat-

<sup>24</sup> *Frink v. Roe*, 70 Cal. 296; *Kenyon v. Quinn*, 41 Cal. 325; *Riley v. Martinelli*, 97 Cal. 580, 83 Am. St. Rep. 211; *Willis v. Pounds*, 6 Tex. Civ. App. 518.

<sup>25</sup> *Bates v. Bacon*, 66 Tex. 348; *McArthur v. Oliver*, 60 Mich. 606; *Westhelmer v. Reed*, 15 Neb. 662; *Kenyon v. Quinn*, 41 Cal. 325; *Gentry v. Callahan*, 89 N. C. 448.

<sup>26</sup> *Hayes v. N. Y. Min. Co.*, 2 Colo. 278.

ute forbids it, as if made subsequently to the issuing of the patent.<sup>27</sup>

In some instances, the purchaser acquires the interest of the plaintiff as well as of the defendant. This is so whenever the title of the plaintiff is essential to accomplish the manifest purpose of the sale. Thus, if the sale is made to satisfy a lien held by plaintiff, it transfers such lien; or, in case the plaintiff held the legal title to secure the debt, the sale divests him of that also. Hence, when a sale is made to enforce a vendor's lien, the purchaser acquires the interests both of the vendor and the vendee in the land,<sup>28</sup> but not the title of the vendor to unpaid notes for the purchase price, given him by the vendee.<sup>29</sup> So a sale under a decree foreclosing a mortgage, though it may not be effectual to divest the title of the mortgagor or his successor in interest, vests in the purchaser the title and rights of the mortgagee.<sup>30</sup> Hence, after such sale, the mortgagee has no power to enter satisfaction of the mortgage or to otherwise impair the force of the assignment resulting from the sale.<sup>31</sup> Other instances occur in which the purchaser succeeds to the rights and interests of both plaintiff and defendant.<sup>32</sup> Thus, where the plaintiff is entitled to maintain proceedings in

<sup>27</sup> *Kingman v. Holthaus*, 59 Fed. Rep. 305; *Massey v. Papin*, 24 How. 362; *Callahan v. Davis*, 90 Mo. 78.

<sup>28</sup> *Vierheller's Appeal*, 24 Pa. St. 106, 62 Am. Dec. 365; *Freeman on Judgments*, § 365; *Zeigler's Appeal*, 69 Pa. St. 471; *Fallon v. Worthington*, 13 Colo. 559, 16 Am. St. Rep. 231.

<sup>29</sup> *Blackmer v. Phillips*, 67 N. C. 340. See, also, *Tally v. Reed*, 74 N. C. 463.

<sup>30</sup> *Brobst v. Brock*, 10 Wall. 519; *Carter v. Walker*, 2 Ohio St. 339; *Frische v. Kramer*, 16 Ohio, 125; *Cheek v. Waldrum*, 25 Ala. 152; *Mount v. Manhattan Co.*, 43 N. J. Eq. 25; *Townshend v. Thompson*, 139 N. Y. 152; *Givins v. Carroll*, 40 S. C. 413, 42 Am. St. Rep. 889.

<sup>31</sup> *Lanier v. McIntosh*, 117 Mo. 508, 38 Am. St. Rep. 676.

<sup>32</sup> *Briley v. Cherry*, 2 Dev. 2. 18 Am. Dec. 561.

equity to have a transfer declared void, because made by defendant to defraud him of his debt, the purchaser at an execution sale based on such debt will be entitled to proceed in the same manner and with like effect.<sup>33</sup> But, generally, the title of the purchaser is only that of the defendant in execution. If the latter is a cotenant, the purchaser will become a cotenant only, and his interest will be subject to the same burdens and incidents as if it had continued to be the property of the judgment debtor.<sup>34</sup> If the judgment debtor is holding under a contract of purchase, the purchaser of his interest at an execution or judicial sale receives and must hold it subject to such contract, and, therefore, in subordination to the rights of the vendor.<sup>35</sup> The title of the purchaser is subject to all equities, liens, and conditions of which he had notice,<sup>36</sup> and to all defects revealed by the judgment and execution.<sup>37</sup>

<sup>33</sup> *Scott v. Purcell*, 7 Blackf. 66, 39 Am. Dec. 453; *Mays v. Rose*, Freem. Ch. 703; *Gentry v. Robinson*, 55 Mo. 260; *Morse v. Sleeper*, 58 Me. 329; *Eastman v. Schettler*, 13 Wis. 324; *Baker v. Dobyns*, 4 Dana, 226; *Miller v. Jamison*, 24 N. J. Eq. 41.

<sup>34</sup> *Polhemus v. Empson*, 27 N. J. Eq. 190; *Threadgill v. Redwine*, 97 N. C. 241; *Fischer v. Eslaman*, 68 Ill. 78; *Hanna v. Steele*, 84 Ala. 305.

<sup>35</sup> *Nat. Bank of Pontiac v. King*, 110 Ill. 254; *Smith v. Lytle*, 27 Minn. 184.

<sup>36</sup> *Boro v. Harris*, 13 Lea, 36; *Weaver v. Brown*, 87 Ala. 533; *Electric L. Co. v. Rust*, 117 Ala. 680; *Wilson v. Slaughter*, 53 Ark. 137; *Bramlett v. Wetlin*, 71 Miss. 902; *Princeton M. Co. v. First N. B.*, 7 Mont. 530; *Gould v. Armogast*, 46 Neb. 897; *Geishaker v. Pancoast* (N. J. Ch.), 40 Atl. 200; *Miller v. Baker*, 166 Pa. St. 414, 45 Am. St. Rep. 680; *Olinger v. Shultz*, 183 Pa. St. 469; *Raley v. Abright* (Tex. Civ. App.), 43 S. W. 538; *Franke v. Lone Star B. Co.*, 17 Tex. Civ. App. 9; *Stearns v. Edson*, 63 Vt. 259, 25 Am. St. Rep. 758; *Reed v. Starkey*, 69 Vt. 200.

<sup>37</sup> *Stotsenburg v. Stotsenburg*, 75 Ind. 538; *Parish Bd. v. Edrington*, 40 La. An. 633; *Nye & S. Co. v. Fahrenholz*, 49 Neb. 276, 59 Am. St. Rep. 540; *Link v. Connell*, 48 Neb. 574; *Tenan v. Cain*, 188 Pa. St. 242; *Willis v. Smith*, 72 Tex. 565; *Williamson v. Jones*, 43 W. Va.

**§ 336. The Effect of Secret Transfers and Equities Existing against the Defendant.**—Though in this section and elsewhere we shall usually speak of the rights of the purchaser, we do not intend to restrict the meaning of that word to the bidder, or the person to whom the sale was originally made. Others may have succeeded to his interest by his assent or otherwise, and have received a conveyance from the officer making the sale. Their rights are, at least, coextensive with his. Persons having liens against the property sold or receiving conveyances from the judgment debtor are, in most of the states, entitled to redeem from the sale, and unless their rights are terminated by a further redemption, it becomes the duty of the officer who made the sale to execute a conveyance to them. They are protected against secret transfers and liens made or created by, and secret equities existing against, the defendant to the same extent as other purchasers.<sup>38</sup>

The purchaser at an execution sale takes his title subject to such liens, easements,<sup>39</sup> and equities,<sup>40</sup> as it was subject to in the hands of the defendant in execution, unless he can show that he is a purchaser in

562, 64 Am. St. Rep. 891; *East Tenn. L. Co. v. Wiggin*, 68 Fed. Rep. 446.

<sup>38</sup> *Hudepohl v. Liberty Hill W. Co.*, 94 Cal. 588, 28 Am. St. Rep. 149; *White v. Leeds L. Co.*, 72 Minn. 352, 71 Am. St. Rep. 488; *Ryan v. Staples*, 78 Fed. Rep. 563.

<sup>39</sup> *Cannon v. Boyd*, 30 Leg. Int. 209; *Taylor v. Lowenstein*, 50 Miss. 278.

<sup>40</sup> *Walke v. Moody*, 65 N. C. 599; *Benham v. Corwin*, 2 Ohio St. 36; *Freeman v. Hill*, 1 Dev. & B. Eq. 689; *Polk v. Gallant*, 2 Dev. & B. Eq. 395, 34 Am. Dec. 410; *Richardson v. Stillinger*, 12 Gill & J. 477; *Riddle v. Bryan*, 5 Ohio, 48; *Rutherford v. Green*, 2 Ired. Eq. 121; *Freeman v. Mebane*, 2 Jones Eq. 44; *Obertheil v. Stroud*, 33 Tex. 522; *Blakenship v. Douglas*, 26 Tex. 225, 82 Am. Dec. 608; *Hart v. Felder*, 4 Desaus. Eq. 202; *Boynton v. Winslow*, 37 Pa. St. 315; *Georgetown v. Smith*, 4 Cranch C. C. 91; *Meade v. Thompson*, Walker, 450; *Osborn v. Prather*, 83 Tex. 208.



good faith and without any notice, actual or constructive, of the existence of such lien, easement, or equity.<sup>41</sup> We have elsewhere had occasion to treat of the rights of purchasers at execution sales, when brought in conflict with claims derived from unrecorded instruments made by the defendant, or based upon some other secret transaction not known to the purchaser.<sup>42</sup> We then said: Wherever, under the law, a deed<sup>43</sup> or mortgage<sup>44</sup> is valid without being recorded, a subsequently attaching judgment lien against the grantor or mortgagor will not be of any benefit to the lienholder as against the deed or mortgage. But a purchaser at a sale under a judgment is, to the same extent as if he were purchaser at a private or voluntary sale, protected from claims previously acquired by third persons from the judgment debtor, of which he has no actual nor constructive notice.<sup>45</sup> But if, at the time of the sale,

<sup>41</sup> *Apperson v. Burgett*, 33 Ark. 328; *Kessey v. McHenry*, 54 Iowa, 187.

<sup>42</sup> *Freeman on Judgments*, §§ 366, 366 a.

<sup>43</sup> *Norton v. Williams*, 9 Iowa, 528; *Bell v. Evans*, 10 Iowa, 353; *Beavan v. Oxford*, 6 De Gex, M. & G. 507; *Goodwin v. Williams*, 5 Grant Ch. 539; *Gillespie v. Van Egmond*, 6 Grant Ch. 533.

<sup>44</sup> *Cathrow v. Eade*, 1 Smale & G. 423; *SeEVERS v. Delashmutt*, 11 Iowa, 174, 77 Am. Dec. 139; *Larrimer's Appeal*, 22 Pa. St. 41; *Hampton v. Levy*, 1 McCord Ch. 107.

<sup>45</sup> *Clark v. Campbell*, 2 Rawle, 215; *Smith v. Painter*, 5 Serg. & R. 223, 9 Am. Dec. 344; *Oviatt v. Brown*, 14 Ohio, 285; *Scott v. Beutel*, 23 Gratt. 1; *Vannice v. Bergen*, 16 Iowa, 555, 85 Am. Dec. 531; *Borden v. Tillman*, 39 Tex. 262; *Norton v. Williams*, 9 Iowa, 528; *Bell v. Evans*, 10 Iowa, 353; *Low v. Blinco*, 10 Bush, 331; *Paine v. Mooreland*, 15 Ohio, 435; *Ellis v. Smith*, 10 Ga. 253; *Butterfield v. Walsh*, 36 Iowa, 534; *Scribner v. Lockwood*, 9 Ohio, 184; *Fosdick v. Barr*, 3 Ohio St. 471; *Byers v. Engles*, 16 Ark. 543; *Jackson v. Chamberlain*, 8 Wend. 620; *Ayres v. Duprey*, 27 Tex. 605, 86 Am. Dec. 657; *Morrison v. Funk*, 23 Pa. St. 421. Purchasers at execution sales are, to the same extent as other purchasers, entitled to the benefit of the statutes requiring instruments affecting the title to real estate to be recorded. *Stewart v. Freeman*, 22 Pa. St. 120; *Helster v. Fort-*

the purchaser has actual notice of any legal or equitable right in a third person, or if, in the absence of such notice, the instrument evidencing such right is properly of record, or if possession is held under it, then the title acquired by the purchaser cannot prejudice the interests of such third person.<sup>46</sup> In the majority of the states, a purchaser, at an execution sale, is, from the time of the payment of his bid, entitled to protection against all transfers, liens, equities, and other claims to or against the property purchased of which he did not at that time have notice,<sup>47</sup> though notice thereof is given to him subsequently, and before he has received or become entitled to a conveyance.<sup>48</sup> In Connecticut, however, where lands are not sold under execution, but are set off to the judgment creditor, his title remains inchoate until the proceedings are recorded, and may be cut off by a conveyance first recorded in the proper office, though not until after the levy of the writ, if

ner, 2 Binn. 40, 4 Am. Dec. 417; Mann's Appeal, 1 Pa. St. 24; Scribner v. Lockwood, 9 Ohio, 184; Waldo v. Russell, 5 Mo. 387; Goepp v. Gartiser, 35 Pa. St. 130; Duke v. Clark, 58 Miss. 465; Lee v. Birmingham, 30 Kan. 312; Draper v. Bryson, 26 Mo. 108, 69 Am. Dec. 483; Grace v. Wade, 45 Tex. 529; Milner v. Hyland, 77 Ind. 458; Miles v. King, 5 S. C. 146.

<sup>46</sup> Davis v. Ownsby, 14 Mo. 170, 55 Am. Dec. 105; Valentine v. Havener, 20 Mo. 133; Chapman v. Coats, 26 Iowa, 288; Hoy v. Allen, 27 Iowa, 208; Byers v. Engles, 16 Ark. 543; Hood v. Fahnestock, 1 Pa. St. 470, 44 Am. Dec. 147; Krider v. Lafferty, 1 Whart. 303.

<sup>47</sup> De Lany v. Knapp, 111 Cal. 165, 52 Am. St. Rep. 160; Duff v. Randall, 116 Cal. 226, 58 Am. St. Rep. 158; Lusk v. Reel, 36 Fla. 418, 51 Am. St. Rep. 32; Shipp v. Gibbs, 88 Ga. 184; St. Louis etc. R. Co. v. Beadle, 6 Kan. App. 922; Luton v. Soper, 94 Mich. 202; Maroney v. Boyle, 141 N. Y. 462, 38 Am. St. Rep. 821; Cowen v. Withrow, 109 N. C. 636; Meigs v. Bunting, 141 Pa. St. 233, 23 Am. St. Rep. 273; Commonwealth v. Calhoun, 184 Pa. St. 629; West v. Loeb, 16 Tex. Civ. App. 399; Meek v. Skeen, 60 Fed. Rep. 322.

<sup>48</sup> Duff v. Randall, 116 Cal. 226, 58 Am. St. Rep. 158; Maroney v. Boyle, 141 N. Y. 462, 38 Am. St. Rep. 821.

executed before.<sup>49</sup> If notice is given prior to payment, it is effective, though after the inception of the judgment or other lien under which the sale is made, whether the judgment creditor had notice thereof or not.<sup>50</sup> The question of what is notice must be determined by the rules applicable to other purchasers. Hence, notice may be inferred from the possession of the property sold by the person making a claim thereto or holding a lien thereon.<sup>51</sup>

In some of the United States, however, the registry laws so modify the effect of conveyances and other instruments concerning real estate as to give a judgment lien precedence over any unrecorded instrument of which the judgment creditor had no knowledge at the date of the attaching of the lien of his judgment,<sup>52</sup> and the holder of the lien takes all the title the records show to be in the judgment debtor.<sup>53</sup> Under statutes of this character, if a judgment creditor has not, at the inception of his lien, notice of an unrecorded lien or conveyance, the purchaser at the sale acquires title paramount thereto, whether he had notice thereof or not.<sup>54</sup> In

<sup>49</sup> *Schroeder v. Tomlinson*, 70 Conn. 348.

<sup>50</sup> *Parks v. People's Bank*, 97 Mo. 130, 10 Am. St. Rep. 295; *Hord v. Harlin*, 143 Mo. 469.

<sup>51</sup> *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35; *Tate v. Pensacola G. etc. Co.*, 37 Fla. 439, 53 Am. St. Rep. 251; *Carr v. Brennan*, 166 Ill. 168, 57 Am. St. Rep. 119; *Wilkins v. Bevler*, 43 Minn. 213, 19 Am. St. Rep. 238; *Pleasants v. Blodgett*, 39 Neb. 714, 42 Am. St. Rep. 624.

<sup>52</sup> *Guiteau v. Wisely*, 47 Ill. 433; *McFadden v. Worthington*, 45 Ill. 362.

<sup>53</sup> *Johnson v. Robinson*, 20 Minn. 189; *Martin v. Dryden*, 1 Gilm. 187; *Kelly v. Mills*, 41 Miss. 281; *Massey v. Westcott*, 40 Ill. 160; *Taylor v. Lowenstein*, 50 Miss. 278; *Low v. Blinco*, 10 Bush, 331; *Lusk v. Reel*, 36 Fla. 418, 51 Am. St. Rep. 32; *Hall v. Sauntry*, 72 Minn. 420, 71 Am. St. Rep. 497.

<sup>54</sup> *Winston v. Hodges*, 102 Ala. 304; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 834; *Lance v. Gorman*, 136 Pa. St. 200, 20 Am. St. Rep. 914.

Alabama, by statute, when a conveyance of real estate is made, it must be recorded within sixty days, or it will be void against creditors or subsequent purchasers without notice. Under this statute, it has been held that if the judgment creditor is not affected with notice of an unrecorded deed, he acquires a lien not limited nor avoided by the deed, and under which a perfect title may be acquired by a purchaser having full notice of the former deed;<sup>55</sup> and, in general, under this or similar statutes, if the lien once attaches, so as to take precedence over prior deeds in favor of a judgment creditor, it is not liable to be defeated by the subsequent recording, before any sale, of a previously executed instrument, nor by giving actual notice of the existence of such instrument.<sup>56</sup>

We have seen that the lien of a judgment is subordinate to all rights, whether legal or equitable, capable of enforcement against the judgment debtor when the lien attached; but that strangers purchasing at an execution sale become thereby purchasers within the meaning of the registry laws, and as such are protected. In some of the states, the immunity of the purchaser from equities and transfers of which he had no notice, actual or constructive, is not fully conceded. In South Carolina, the holder of an unrecorded deed, of which the purchaser had no notice, may, by recording it after the sale, and before the execution of the sheriff's deed, obtain precedence over the latter.<sup>57</sup> In New York, it has been held that the purchaser is bound by an agreement of which he had no notice, by virtue of which the judg-

<sup>55</sup> *De Vendell v. Hamilton*, 27 Ala. 156; *Sharp v. Shea*, 32 N. J. Eq. 65; *Rutgers v. Kingsland*, 3 Halst. Ch. 178.

<sup>56</sup> *Pollard v. Cocke*, 19 Ala. 188; *Fash v. Ravesties*, 32 Ala. 451.

<sup>57</sup> *Leger v. Doyle*, 11 Rich. 109, 69 Am. Dec. 240.

ment had lost "its apparent position as a lien upon real estate."<sup>58</sup> In Mississippi, "the registry laws protect creditors and subsequent purchasers alike, but only as against unrecorded instruments named in such laws. They do not apply or afford protection to creditors or subsequent purchasers against equities which arise by operation of law, and which are incapable of being recorded. As to such equities, the purchaser at execution sale remains, as at common law, a mere volunteer, and acquires only the interest of the defendant in execution." Hence, his purchase is subject to undisclosed vendor's liens.<sup>59</sup>

The judgment creditor may also become a purchaser at the sale. In so doing he may make a bid, and thereby produce a complete or partial satisfaction of his judgment. The question then arises, whether he thereby becomes a purchaser for value, and whether, as such, he is protected by the registry law from infirmities in the debtor's title of which, when purchasing, the creditor had no notice, actual or constructive. In Iowa, a judgment debtor, at the rendition of the judgment, held lands under an implied trust, in pursuance of which, subsequent to the judgment, he made a conveyance to his cestui que trust. The latter failed to record his deed, and the lands were sold to the creditor without any notice of the deed, or of the facts out of which it arose. The supreme court thought this a proper case in which to apply the "wholesome rule of equity, that where one of two innocent persons must suffer, the loss will fall upon that party who has been guilty of the first negligence," and therefore sustained the title of the creditor, based on the purchase under his own

<sup>58</sup> Frost v. Yonkers, 70 N. Y. 553; Clute v. Emmerich, 99 N. Y. 342.

<sup>59</sup> Lissa v. Posey, 64 Miss. 352.

judgment.<sup>60</sup> This case was but an affirmance of a prior decision in the same state, declaring that, "when a creditor merges his judgment into a title, without actual or constructive notice of prior equities, he becomes a purchaser, and is entitled to protection in the absence of equitable circumstances, with any other subsequent bona fide purchaser."<sup>61</sup> The Iowa view accords with that entertained in several of the other states.<sup>62</sup> But probably a slight preponderance of the authorities dissents from the conclusions reached in Iowa, and maintains that "to constitute a person a bona fide purchaser, within the meaning of the statute, he must, upon the faith of the purchase of the property, have advanced for it a valuable consideration"; and that, "if he was a creditor antecedent to his purchase, and paid for the purchase by a credit on his demand, then, inasmuch as he has parted with no consideration on the faith of the purchase, he is not a bona fide purchaser, within the meaning of the statute."<sup>63</sup>

<sup>60</sup> *Gower v. Doheney*, 33 Iowa, 36; *Evans v. McGlasson*, 18 Iowa 150; *Ettenheimer v. Northgraves*, 75 Iowa, 28. See, also, *Parker v. Pierce*, 16 Iowa, 227; *Walker v. Elston*, 21 Iowa, 529; *Butterfield v. Walsh*, 21 Iowa, 97, 89 Am. Dec. 557; *Vannice v. Berger*, 16 Iowa 555, 85 Am. Dec. 531; *Butterfield v. Walsh*, 36 Iowa, 534.

<sup>61</sup> *Halloway v. Platner*, 20 Iowa, 121, 89 Am. Dec. 517.

<sup>62</sup> *Foorman v. Wallace*, 75 Cal. 552; *Hunter v. Watson*, 12 Cal. 377; *Riley v. Martinelli*, 97 Cal. 575, 33 Am. St. Rep. 209; *Lusk v. Reel*, 36 Fla. 418, 51 Am. St. Rep. 32; *Vitito v. Hamilton*, 86 Ind. 137; *Wood v. Chapin*, 13 N. Y. 599, 67 Am. Dec. 62.

<sup>63</sup> *Ayres v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657; *Williams v. Hollingsworth*, 1 Strob. Eq. 103, 47 Am. Dec. 527; *Orme v. Roberts*, 33 Tex. 768; *Barnet v. Vincent*, 69 Tex. 685, 5 Am. St. Rep. 98; *Evans v. Welborne*, 74 Tex. 530, 15 Am. St. Rep. 858; *Banning v. Eden*, 6 Minn. 402; *Wright v. Douglass*, 10 Barb. 97; *Dickerson v. Tillinghast*, 4 Paige, 215, 25 Am. Dec. 528. But the New York cases here cited are, in effect, overruled by the subsequent case of *Wood v. Chapin*, 13 N. Y. 599, 67 Am. Dec. 62. Plaintiff purchasing under his own writ acquires no title to goods fraudulently purchased by defendant. Where the original owner has the right to reclaim them

If a purchaser, before the time for redemption expires, assigns all his rights, or the certificate of purchase issued in evidence thereof, we apprehend that his assignee is affected by secret transfers made by, and secret liens existing against, the defendant in execution to the same extent only as the original purchaser, and hence that they may be asserted against such assignee, whether he knows of them or not, if they could have been asserted against the purchaser had he not assigned.<sup>64</sup>

**§ 337. The Effect of Agreements to Hold the Property for the Defendant.**—It has frequently happened that persons whose property was about to be sold under execution have been induced to relax their efforts

from the defendant, he has an equal right to make such reclamation from a purchasing plaintiff. *Devoe v. Brandt*, 53 N. Y. 462. Plaintiff purchasing at a sale under his own writ "takes subject to all equities against the defendant in execution, whether he has notice of them or not." *Rollins v. Henry*, 78 N. C. 342; *Delespine v. Campbell*, 52 Tex. 4. The supreme court of Indiana, in two cases, both decided at the November term, 1882, seems to have decided this question both ways. In *Vitito v. Hamilton*, 86 Ind. 137, the court said: "The case falls within the rule that one who purchases at an execution sale, although himself the execution plaintiff, is a bona fide purchaser, and protected against all prior equities." But in *Carnahan v. Yerkes*, 87 Ind. 62, it declared that "an execution creditor who bids off property at a sale upon his own execution, and applies the bid to the payment of his own judgment, is not regarded as a bona fide or innocent purchaser," and subsequent decisions make it certain that the doctrine of the earlier cases has met with the disapproval of the courts of this state, and that in them a judgment creditor is not entitled to protection as a bona fide purchaser where the only payment made by him is by crediting the amount of his bid on his judgment. *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381; *Boos v. Morgan*, 130 Ind. 305, 30 Am. St. Rep. 236.

<sup>64</sup> *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125; *Roberts v. Clelland*, 82 Ill. 538; *Ohytraus v. Smith*, 141 Ill. 231.

toward making payment, and to permit a third person to become the purchaser at the sale, under a parol agreement that such purchaser would hold the property for the benefit of the defendant, and would permit him to redeem from the sale, upon equitable terms specified in the parol agreement. After such purchase has been made, the purchasers have, in many instances, endeavored to hold the property regardless of their agreement, and have sought to shield themselves from the operation of the agreement by claiming that it could not be enforced because it was not in writing, and could not therefore be proved under the statute of frauds. But the answer which courts of equity have always made to their plea is, that purchasers who become such *ex maleficio* should be treated as the trustees of defendants in execution, and compelled to comply with their parol agreements.<sup>65</sup> It is true that a recent decision in Pennsylvania lays down the general proposition that nothing can be clearer than that a mere naked, parol agreement by the purchaser, that he will hold the premises in trust for the defendant, cannot be enforced against the former, and in favor of the latter.<sup>66</sup> This case does not profess, however, to specify the circumstances in which the agreement will be considered as a "mere naked agreement"; and from prior decisions in the same state, we infer that, even

<sup>65</sup> *Denton v. McKenzle*, 1 Desau. Eq. 289, 1 Am. Dec. 664; *Lillard v. Casey*, 2 Bibb, 459; *Arnold v. Cord*, 16 Ind. 177; *Strong v. Glasgow*, 2 Murph. 289; *Combs v. Little*, 3 Green Ch. 310; *Williams v. Williams*, 8 Bush, 241; *Martin v. Martin*, 16 B. Mon. 8; *Miller v. Antle*, 2 Bush, 407, 92 Am. Dec. 495; *Green v. Ball*, 4 Bush, 586; *Langhorne v. Payne*, 14 B. Mon. 624; *Dobson v. Erwin*, 1 Dev. & B. 569; *Byrnes v. Morris*, 53 Tex. 213; *Mulholland v. York*, 82 N. C. 510; *Peebles v. Pate*, 90 N. C. 348.

<sup>66</sup> *Dollar Savings Bank v. Bennett*, 76 Pa. St. 402; *Barnet v. Dougherty*, 32 Pa. St. 371.



where, a purchaser under such a parol agreement will be held as a trustee, where it is shown that the transaction was intended as a mere mortgage,<sup>67</sup> or where, owing to the agreement, the purchaser had been permitted to bid in the property upon terms that would not otherwise have been open to him.<sup>68</sup>

**§ 338. The Interest of the Purchaser as against Prior Liens.**—An execution sale necessarily takes precedence over all liens junior to that upon which it was based.<sup>69</sup> Its effect upon senior liens differs in the different states. In the majority, the senior liens, whether existing by judgment or otherwise, are not impaired by the sale. Their effect, and the remedies by which they may be enforced, remain as before.<sup>70</sup> In making the sale, neither the plaintiff nor the sheriff is under any obligation to make any statement concerning the existence or extent of paramount liens.<sup>71</sup> To the rule that a sale under a junior lien or writ does not affect prior liens an exception exists, as we have heretofore shown, where several writs of execution are in the hands of the officer at the time of the sale, in which event, the sale, though it purports to be made under the junior writ, is, in contemplation of law, made under all the writs in his hands, and the proceeds of the sale must be applied to the several writs in the order of their priority. Hence,

<sup>67</sup> Sweetzer's Appeal, 71 Pa. St. 264.

<sup>68</sup> Boynton v. Houser, 73 Pa. St. 453; Beegle v. Wentz, 55 Pa. St. 369, 93 Am. Dec. 762.

<sup>69</sup> Willis v. Willis, 22 La. Ann. 447; Ex parte Elwood, 1 Denio, 633; Barden v. Grady, 37 Ga. 660.

<sup>70</sup> Freeman on Judgments, § 877; Lathrop v. Brown, 23 Iowa, 40; Rankin v. Scott, 12 Wheat. 177; Littlefield v. Nichols, 42 Cal. 372; Shotwell v. Murray, 1 Johns. Ch. 512; Bruce v. Vogel, 38 Mo. 100; Horne v. Seisel, 92 Ga. 683; Crosby v. The Lillie, 40 Fed. Rep. 367; Edler v. Clark, 51 Fed. Rep. 117.

<sup>71</sup> Carson's Sale, 6 Watts, 140.

the lien of all of them is divested by a sale under any, whether senior or junior.<sup>72</sup> In some of the states an execution sale divests the lien of all judgments against the defendant, whether executions thereon are in the hands of the sheriff or not, but leaves other senior liens unaffected.<sup>73</sup>

In some states, a sale of property under execution has, in most cases, the effect of transferring title regardless both of junior and of senior liens against the property. The claim of the lienholders is released from the property and attached to its proceeds in the hands of the officer.<sup>74</sup> The question of liens under this system is one in which the purchaser rarely need take any interest. The lienholders must have it litigated and determined in proceedings for the distribution of the funds realized from the sale. If either of them fails to present his claim so that it may be satisfied out of these funds, or if, the claim being presented, the pro-

<sup>72</sup> *Bernhardt v. Brown*, 118 N. C. 700; *Gambrill v. Wilcox*, 111 N. C. 42; ante, § 196.

<sup>73</sup> *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Dowdell v. Neil*, 10 Ga. 148; *Harwell v. Fitz*, 20 Ga. 723; *Horne v. Seisel*, 92 Ga. 683; *Blohme v. Lynch*, 26 S. C. 300; *Trumbo v. Cumming*, 26 S. C. 336; *Cromer v. Bolnest*, 27 S. C. 436.

<sup>74</sup> *Vickory v. Vickory*, 1 Harr. (Del.) 193, note; *Foulke v. Millard*, 108 Pa. St. 230; *Rushtin v. Lippincott*, 119 Pa. St. 12; *In re Fairhope B. Co.'s Estate*, 183 Pa. St. 96; *Beekman's Appeal*, 38 Pa. St. 385; *Farmers' Bank v. Wallace*, 3 Harr. (Del.) 370; *Custer v. Detterer*, 3 Watts & S. 28; *Commonwealth v. Alexander*, 14 Serg. & R. 257. This rule formerly prevailed in North Carolina (*Ricks v. Blount*, 4 Dev. 128; *Jones v. Judkins*, 4 Dev. & B. 454, 34 Am. Dec. 392; *Isler v. Moore*, 67 N. C. 74; *Woodley v. Gilliam*, 67 N. C. 234; *Couglan v. White*, 66 N. C. 102); but is now superseded by the code (*Perry v. Morris*, 65 N. C. 221; *Woodley v. Gilliam*, 67 N. C. 237). In Georgia, a sale under execution transfers title free from the lien of prior judgments (*Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435; *Dowdell v. Neal*, 10 Ga. 148), but subject to prior mortgages (*Harwell v. Fitts*, 20 Ga. 723).

ceeds are consumed by paramount claims, then the lienholder must suffer the loss of his lien.

The distinction between liens and interests must be kept in view. Superior liens may be discharged by a sale; but superior interests cannot be thus removed. The purchaser may succeed to the defendant's title freed from the liens to which it was subject in the defendant's hands. He cannot, however, succeed to a title or interest not held by the defendant. A widow's right to dower is not a lien upon, but an interest in, lands. It is, therefore, not divested by an execution sale, even in those states where such sales, as a general rule, release all liens.<sup>75</sup> In Pennsylvania, however, the more recent decisions indicate that an execution sale under a valid judgment against a husband or wife, unless it is part of a fraudulent scheme to deprive him or her of marital rights, "carries the title of the defendant to the purchaser, and extinguishes the interest, present or prospective, of the wife or husband of the defendant."<sup>76</sup>

Even in those states where the general policy of the law is to sell property under execution, freed from all liens, many exceptions disturb the harmonious application of the general rule. Thus, in Pennsylvania, all paramount liens of an indefinite, indeterminate value remain a charge on the property, because it is impossible to calculate the amount of their value for the purpose of deducting it from the proceeds of the sale.<sup>77</sup>

<sup>75</sup> Schall's Appeal, 40 Pa. St. 170; Fisher v. Kean, 1 Watts, 259; Lynde v. Wakefield, 19 Mont. 23. But a legacy made a charge on lands is a lien, and will be released as such. Lobach's Case, 6 Watts, 167; McLanahan v. Wyant, 1 Penr. & W. 112, 21 Am. Dec. 363.

<sup>76</sup> Wells v. Bunnell, 160 Pa. St. 460.

<sup>77</sup> Heist v. Baker, 49 Pa. St. 9; McKenzey's Appropriation, 3 Pa. St. 156; Lauman's Appeal, 8 Pa. St. 473.

"In this state all judicial sales pass property clear of all liens, with three exceptions, viz., first, those created by last wills, etc., as provisions for wives or children; second, when an encumbrance will not admit of valuation; third, where it is plain from the agreement of the parties that it was intended to run with the land."<sup>78</sup> If a lien is for a definite amount, due at an ascertained time, its release is not avoided by the fact that the time for payment has not yet arrived.<sup>79</sup> A mortgage to the state is not released by an execution sale.<sup>80</sup> By the present statutes of Pennsylvania, when a mortgage is prior to all other liens except those of other mortgages, and for ground-rents, it continues to be a charge on the lands after an execution sale.<sup>81</sup> If, however, judgment be recovered for the principal or interest on a note or bond secured by mortgage, a sale thereunder releases the property from the mortgage lien.<sup>82</sup>

As a general rule no officer has the power to prescribe terms or conditions of sale in addition to or different from those prescribed by law. Hence, his sales must, with reference to prior liens, be governed by law, rather than by terms which he assumes the power to impose.<sup>83</sup> But if it is understood and agreed between the parties in interest and the purchaser, that

<sup>78</sup> *Re Fairhope B. Co.'s Estate*, 183 Pa. St. 96.

<sup>79</sup> *Hellman v. Hellman*, 4 Rawle, 440; *Lobach's Case*, 6 Watts, 167.

<sup>80</sup> *Duncan v. Reiff*, 3 Penr. & W. 368.

<sup>81</sup> *Kuhn's Appeal*, 2 Pa. St. 264; *Bratton's Appeal*, 8 Pa. St. 164; *Mehaffy v. Share*, 2 Penr. & W. 361; *Whitehead v. Purnell*, 2 Miles, 434. The rule was otherwise prior to 1830. *Willard v. Norris*, 2 Rawle, 56; *Corporation v. Wallace*, 3 Rawle, 109.

<sup>82</sup> *Hartz v. Woods*, 8 Pa. St. 471; *Pierce v. Potter*, 7 Watts, 475.

<sup>83</sup> *Randolph's Case*, 5 Pa. St. 242; *Hellman v. Hellman*, 4 Rawle, 440; *Eshelman v. Witmer*, 2 Watts, 263; *Aulenbaugh v. Umbehauer*, 8 Watts, 48; 3 Watts & S. 259; *Mode's Appeal*, 6 Watts & S. 280.

he will take the property subject to prior encumbrances, this agreement will be enforced; the judgment creditor making the sale will be entitled to the proceeds, and the prior lienholders will retain their liens against the property.<sup>84</sup>

§ 339. **General Effect of Irregularities.**—We have necessarily, in treating of the issue and form of executions, and the various steps taken by authority thereof, considered the effect of various irregularities upon the rights of persons deraigning title through execution sales. The general principle to be deduced from all the authorities is, that the title of a purchaser, not himself in fault, cannot be impaired at law nor in equity by showing any mere error or irregularity in the proceedings.<sup>85</sup> Errors and irregularities must be corrected by a direct proceeding. If not so corrected, they cannot be made available by way of a collateral attack on the purchaser's title.<sup>86</sup> Hence, an execution sale

<sup>84</sup> *Stackpole v. Glassford*, 16 Serg. & R. 163; *Tower's Appropriation*, 9 Watts & S. 103, 42 Am. Dec. 319; *McMurray v. Hopper*, 43 Pa. St. 468; *Zeigler's Appeal*, 35 Pa. St. 173.

<sup>85</sup> *Park v. Darling*, 4 Cush. 197; *Warren v. Twilley*, 10 Md. 39; *Armstrong v. Jackson*, 1 Blackf. 210; 12 Am. Dec. 225; *Sullivan v. Hearnden*, 11 Ga. 294; *Seelye v. Smith*, 85 Ala. 25; *Ribelin v. Peugh*, 126 Ind. 216; *Moekel v. Borders*, 129 Ind. 529; *Brown v. Bose*, 55 Neb. 200; *McGlawhorn v. Worthington*, 98 N. C. 199; *Huckins v. Kapf* (Tex. App.), 14 S. W. 1016; *Elliott v. Knott*, 14 Md. 121; *Bolgiano v. Cook*, 19 Md. 375; *Frakes v. Brown*, 2 Blackf. 295; *Manahan v. Sammon*, 3 Md. 463; *Marshall v. Greenfield*, 8 Gill & J. 349, 29 Am. Dec. 559; *Moore v. Neil*, 39 Ill. 256, 89 Am. Dec. 303; *Dingleline v. Hershman*, 53 Ill. 280; *Boles v. Johnston*, 23 Cal. 226, 83 Am. Dec. 111; *Avery v. Rose*, 4 Dev. 553; *Jackson v. Roosevelt*, 13 Johns. 97; *Oxley v. Mizle*, 3 Murph. 250; *Hewitt v. Weatherby*, 57 Mo. 276.

<sup>86</sup> *Cabell v. Grubbs*, 48 Mo. 353; *Norton v. Quimby*, 45 Mo. 388; *Rigg v. Cook*, 4 Gilm. 336; *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275; *Jackson v. Spink*, 4 Chic. L. N. 309; *Kelsey v. Dunlap*, 7 Cal. 160; *Stetson v. Freeman*, 35 Kan. 523; *Oram v. Rothermel*,

cannot be collaterally avoided because real estate was sold without first levying upon personalty,<sup>87</sup> nor because of irregularities or deficiencies in the advertisement,<sup>88</sup> nor of defects in the affidavit for the attachment under which the sale was made,<sup>89</sup> nor for incorrect taxation of costs,<sup>90</sup> nor for defects in the levy,<sup>91</sup> nor because execution was issued against one only of several judgment debtors,<sup>92</sup> or real property was sold en masse when it consisted of separate parcels,<sup>93</sup> nor for irregularities in adjourning the sale,<sup>94</sup> nor because

<sup>88</sup> Pa. St. 300; *Hering v. Chambers*, 103 Pa. St. 172; *Nagle v. Macy*, 9 Cal. 426; *Winchester v. Winchester*, 1 Head, 460; *Smith v. Perkins*, 81 Tex. 152, 26 Am. St. Rep. 794.

<sup>87</sup> *Doe v. Meyers*, 9 U. C. Q. B. 465; *Faris v. Banton*, 6 J. J. Marsh. 237; *Frakes v. Brown*, 2 Blackf. 295; *Denham v. Holeman*, 26 Ga. 182, 71 Am. Dec. 198; *Hayden v. Dunlap*, 3 Bibb. 216; *Dice v. Penn*, 2 Swan, 561; *Dowdell v. Neal*, 10 Ga. 148; *Wilbanks v. Untriner*, 98 Ga. 801; *Wheeling etc. Co. v. First N. B.*, 53 Oh. St. 233.

<sup>88</sup> *Jones v. Fulgham*, 2 Murph. 364; *Kilby v. Haggin*, 3 J. J. Marsh. 213; *Solomon v. Peters*, 37 Ga. 251, 92 Am. Dec. 69; *Cooley v. Wilson*, 10 West. Jur. 283; *Johnson v. Reese*, 28 Ga. 353, 73 Am. Dec. 757; *Hendrick v. Davis*, 27 Ga. 167, 73 Am. Dec. 726; *Ogden v. Walters*, 12 Kan. 282; ante. § 286.

<sup>89</sup> *Graff v. Louls*, 71 Fed. Rep. 591.

<sup>90</sup> *Wilkins v. Huse*, 9 Ohio, 154; *Herring v. Chambers*, 103 Pa. St. 172.

<sup>91</sup> *Cooper v. Borrall*, 10 Pa. St. 491; *Swiggett v. Kollock*, 3 Houst. 326; *White v. Farley*, 81 Ala. 563; *Owen v. Baker*, 101 Mo. 407, 20 Am. St. Rep. 618; *Hyde v. Barney*, 17 Vt. 280, 44 Am. Dec. 335. A levy may, however, be jurisdictional, as where defendant is out of the state, and the service of process on him is not made therein. In such cases, the judgment of the court cannot operate except upon property which has been levied upon under attachment, and the absence of, or a substantial defect in, such levy may be shown for the purpose of avoiding the judgment and sale. *New England M. Co. v. Watson*, 99 Ga. 733.

<sup>92</sup> *Flanders v. Batten*, 50 Hun. 542.

<sup>93</sup> *Gregory v. Bovier*, 77 Cal. 121; *Crain v. Hogan (Tex.)*, 16 S. W. 1019.

<sup>94</sup> *Reid v. Largent*, 4 Jones, 454; *Pope v. Bradley*, 8 Hawks, 16; *Mordecai v. Speight*, 3 Dev. 428, 24 Am. Dec. 266.

the interest levied upon and sold is less than that held by the defendant,<sup>95</sup> nor because the property of a surety was seized when the duty of the officer was to first levy upon the property of the principal,<sup>96</sup> nor because the sale was made in disregard of an order staying all proceedings,<sup>97</sup> or upon an execution or order of sale issued without the plaintiff's direction,<sup>98</sup> nor for the failure of the officer making the sale to properly apply its proceeds.<sup>99</sup>

Where there is any defect in stating the facts necessary to support a sale, the existence of such facts will generally be presumed.<sup>100</sup> "A bona fide purchaser at a sheriff's sale is protected by the presumption that the judgment of a competent court of record has been correctly rendered, and that the execution in the hands of the officer has been regularly issued. He may fairly presume that the sheriff, in the discharge of his duties, has acted according to law."<sup>101</sup> If the sheriff's return fails to state whether or not the land was appraised before it was sold, the presumption, in the absence of any other evidence on the subject, must be indulged that the sheriff did his duty in regard to such appraisal.<sup>102</sup> "It has been repeatedly held by this court that where the return of a sheriff is silent as to some matter imposed upon him in connection with the sale to which the return relates, it will be presumed that

<sup>95</sup> Knight v. Leak, 2 Dev. & B. 133; O'Conner v. Youngblood, 16 Ala. 718; Ribellin v. Peugh, 126 Ind. 216; contra, McLaughlin v. Shields, 12 Pa. St. 283.

<sup>96</sup> Sellars v. Fite, 3 Baxt. 131; Brackenbridge v. Cobb, 85 Tex. 448.

<sup>97</sup> Monell v. Lawrence, 12 Johns. 521.

<sup>98</sup> Sowles v. Harvey, 20 Ind. 217.

<sup>99</sup> Farrington v. Duval, 32 S. C. 590.

<sup>100</sup> Hollingsworth v. Dickey, 24 Ga. 434.

<sup>101</sup> Coker v. Dawkins, 20 Fla. 141; Quarles v. Hiern, 70 Miss. 891.

<sup>102</sup> Talbott v. Hale, 72 Ind. 1.

the sheriff did his duty, until it is otherwise shown by some appropriate proceeding.”<sup>103</sup>

A purchaser's title may generally be defeated by showing that the judgment was satisfied by payment,<sup>104</sup> or by the imprisonment of the defendant under execution,<sup>105</sup> or by proving that the sale was made privately,<sup>106</sup> or that the purchase was made for the benefit of the officer who conducted the sale,<sup>107</sup> or of one of the appraisers, when the statute forbids his purchasing at the sale,<sup>108</sup> or without allowing the defendant the benefit of appraisal when he was entitled to it.<sup>109</sup> In New Jersey, a purchaser's title may, it seems, be avoided by showing that the officer who executed the writ was guilty of a departure from the forms prescribed by law.<sup>110</sup> A sale is also void when it is shown by the record to have been made in a manner different from that prescribed by the judgment under which it was authorized, as where the judgment or the law required the property to be sold to the person who would take the least portion thereof, and pay

<sup>103</sup> *Ferrier v. Deutchman*, 81 Ind. 392; *Woolen v. Rockafeller*, 81 Ind. 208.

<sup>104</sup> *Jackson v. Morse*, 18 Johns. 441, 9 Am. Dec. 225; *Cameron v. Irwin*, 5 Hill. 272; *Den v. Roberts*, 11 Ired. 424; *Hunter v. Stevenson*, 1 Hill (S. C.), 415; *Thrower v. Vaughan*, 1 Rich. 18; but a satisfaction which will render invalid an execution sale must be complete, and it cannot be avoided because payments were made which were not credited on the writ, provided some part of the judgment remained unsatisfied when the sale took place. *Milmine v. Bass*, 29 Fed. Rep. 632.

<sup>105</sup> *Kennedy v. Duncklee*, 1 Gray. 65; *King v. Goodwin*, 16 Mass. 63; *Loomis v. Storrs*, 4 Conn. 440.

<sup>106</sup> *Hutchinson v. Cassidy*, 46 Mo. 431.

<sup>107</sup> *Carpenter v. Stilwell*, 11 N. Y. 61; ante, § 292.

<sup>108</sup> *Reno v. Hale*, 28 Neb. 646.

<sup>109</sup> *Wolf v. Payne*, 35 Pa. St. 97; *St. Bartholomew's Church v. Wood*, 61 Pa. St. 96; ante, § 284.

<sup>110</sup> *Todd v. Philhower*, 4 Zab. 796.



the judgment and all costs, and the deed states that the sale was made to the highest and best bidder.<sup>111</sup> A judgment of one of the late confederate state courts is not absolutely void. If the defendant takes no proceeding to vacate it, and submits to the issue of execution and sale of his property, the sale is valid.<sup>112</sup> In Pennsylvania, a sale made under process, the issuing of which, at the time it issued, was forbidden by law, is judged to be void.<sup>113</sup> In Georgia, a sale in violation of an injunction is thought to be irregular merely.<sup>114</sup>

**§ 340. Effect of Irregularities where Plaintiff or his Attorney has Purchased.**—With respect to infirmities in the proceedings, the plaintiff and his attorney are less favored than strangers to the writ. Strangers are allowed and encouraged to rely upon the facts set forth in the record, and upon the presumption that all the officers of the law have in all respects performed their duties. But if notice of vices or infirmities in the proceedings is brought home to strangers purchasing at execution sales, then such vices or infirmities may impair the title in the hands of such purchaser with notice;<sup>115</sup> but it is incumbent on the plaintiff and his attorney to keep informed of all the proceedings taken in the case under their direction, or by virtue of their authority. The law will not permit them to be ignorant of such proceedings. Hence, if there is any irregularity in the proceedings, neither the plaintiff nor his attorney can, on becoming purchaser under the

<sup>111</sup> French v. Edwards, 13 Wall. 503.

<sup>112</sup> Bush v. Glover, 47 Ala. 167.

<sup>113</sup> Sheetz v. Wynkoop, 74 Pa. St. 198; Cadmus v. Jackson, 52 Pa. St. 295.

<sup>114</sup> Rikeman v. Kohn, 48 Ga. 183.

<sup>115</sup> Lang Syne G. M. Co. v. Ross, 20 Nev. 127, 19 Am. St. Rep. 337.

execution, protect his title by showing that he was ignorant of the irregularity. Some authorities make the general assertion that neither the plaintiff nor his attorney can hold property purchased under a voidable writ.<sup>116</sup> We by no means assent to this conclusion. There are many irregularities of sufficient gravity to warrant the vacating of a writ on prompt application, but which the defendant will not be able to successfully assert after he has been guilty of tacitly ratifying the irregularity by his unwarrantable delay. There are also many cases in which the motion to vacate a writ for errors in form may be met by a counter-motion to correct the errors and permit the writ to stand. Wherever the irregularity is such that the defendant can be deemed to have waived it by his laches in not sooner complaining, or where it is of such a character that it can be cured by amending the writ, we think it cannot render the sale void, although the plaintiff may have purchased. But it is certain that neither the plaintiff<sup>117</sup> nor his attorney<sup>118</sup> can ever be treated as purchasers having no notice of vices and irregularities in the judgment and proceedings; and that whatever

<sup>116</sup> *Keeling v. Heard*, 3 Head, 592; *Walte v. Dalby*, 8 Humph. 406.

<sup>117</sup> *Purser v. Cady*, 120 Cal. 214; *King v. Cushman*, 41 Ill. 31, 89 Am. Dec. 366; *Pettingill v. Moss*, 3 Minn. 223, 74 Am. Dec. 747; *Raub v. Heath*, 8 Blackf. 575; *Harrison v. Doe*, 2 Blackf. 1; *Bybee v. Ashby*, 2 Gilm. 151, 43 Am. Dec. 47; *Steinback v. Leese*, 27 Cal. 295; *Winston v. Otley*, 25 Miss. 451; *Stephens v. Dennison*, 1 Or. 19; *Christian v. Newberry*, 61 Mo. 446; *Bole v. Newberger*, 81 Ind. 274; *Boyd v. Ellis*, 11 Iowa, 97; *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118. Where plaintiff purchases in the name of another, but for his own benefit, the rule is the same as if he had purchased in his own name. *Barber v. Reynolds*, 44 Cal. 520.

<sup>118</sup> *Moody v. Harper*, 38 Miss. 599; *Stewart v. Croes*, 5 Gilm. 442; *Simonds v. Catlin*, 2 Caines, 61; *Cole. & C. Cas.* 346; *Huffman v. Gaines*, 47 Ark. 226; *O'Brien v. Harrison*, 59 Iowa, 686; *Hays v. Cassell*, 70 Ill. 669; *McLean Co. Bank v. Flagg*, 31 Ill. 290, 83 Am. Dec. 224.

rights and equities the defendant in execution may assert against a purchaser with notice, he may also assert against the plaintiff or his attorney, whether either had any actual notice or not.

What are the rights of an innocent purchaser from the plaintiff when such irregularities exist that the sale to the latter under his writ may be treated as void, so far as his interests are involved, or vacated by some appropriate motion or suit? If the time for redemption has expired, and a conveyance has been executed to the plaintiff and apparently invests the grantee with the legal title, probably the latter will, in all subsequent proceedings, be conceded the same rights as if he had himself made the purchase at the execution sale. If, before he is entitled to the conveyance, the plaintiff transfers his certificate of purchase, his assignee acquires a mere equity, and may, it has been held, be affected with notice of any vice or irregularity given to him before he acquires the legal title by receiving a conveyance pursuant to the sale.<sup>119</sup>

**§ 341. Purchaser not Bound to Show the Officer's Return.**—Where the title of the defendant is sought to be divested by extending real estate under execution in the methods pursued in the New England states, the officer's return upon the writ is an indispensable muniment of the plaintiff's title. Not only is the muniment indispensable, but it requires to be drawn with fullness and exactness. It must show full compliance with all the provisions of the statute. If it fails in this, the plaintiff's title under the extent is without validity.<sup>120</sup> Where property is sold under execution, the rule is

<sup>119</sup> *Smith v. Huntoon*, 134 Ill. 24, 23 Am. St. Rep. 646.

<sup>120</sup> *Wilcox v. Emerson*, 10 R. I. 270, 14 Am. Rep. 683.

altogether different. No doubt the officer ought, in all cases, to make a full and correct return. But the purchaser's title is not dependent on the performance of this duty by the officer. The purchaser has no control over the officer, and therefore is not prejudiced by a deficient or incorrect return, nor by the entire absence of any return whatever.<sup>121</sup>

**§ 342. Effect of Fraudulent Practices in Which the Purchaser Participated, or of Which he had Notice.—**

The protection which the law extends to purchasers at execution and judicial sales, whereby they are shielded from secret frauds and irregularities, rests upon public policy. This public policy demands that there should be such confidence in the proceedings of the courts and of their officers, that persons acting in good faith shall not be afraid to invest their capital in the purchase of property exposed to the hazard of sacrifice at compulsory sales, when the proceedings have the appearance

<sup>121</sup> *Forrest v. Camp*, 16 Ala. 642; *Brooks v. Rooney*, 11 Ga. 423, 56 Am. Dec. 430; *Stewart v. Houston*, 25 Ark. 311; *Phillips v. Coffee*, 17 Ill. 156, 63 Am. Dec. 357; *Hopping v. Burnam*, 2 G. Greene, 39; *Hunt v. Loucks*, 38 Cal. 372, 99 Am. Dec. 404; *Humphrey v. Beesom*, 1 G. Greene, 199, 48 Am. Dec. 370; *Doe v. Heath*, 7 Blackf. 154; *Low v. Adams*, 6 Cal. 277; *Thurston v. Barnes*, 10 Ind. 289; *Banks v. Evans*, 10 Smedes & M. 35, 48 Am. Dec. 734; *Kinney v. Knoebel*, 47 Ill. 417; *Buchanan v. Tracy*, 45 Mo. 437; *Wheaton v. Sexton*, 4 Wheat. 503; *Jackson v. Spink*, 59 Ill. 404; *Jackson v. Sternbergh*, 1 Johns. Cas. 153; *Smull v. Mickley*, 1 Rawle, 95; *State v. Salyers*, 19 Ind. 432; *Mitchell v. Lipe*, 8 Yerg. 179, 29 Am. Dec. 116; *Blood v. Light*, 38 Cal. 649, 99 Am. Dec. 441; *Shaffer v. Bolander*, 4 G. Greene, 201; *Cloud v. El Dorado*, 12 Cal. 133, 73 Am. Dec. 526; *Clark v. Lockwood*, 21 Cal. 224; *Barney v. Patterson*, 6 Har. & J. 182; *Hinds v. Scott*, 11 Pa. St. 19, 51 Am. Dec. 506; *Gibson v. Winslow*, 38 Pa. St. 49; *Den v. Hamilton*, 1 Tayl. 10; *Hutchins v. Carver Co.*, 16 Minn. 13; *Ingram v. Belk*, 2 Strob. 207; *Ritter v. Scannell*, 11 Cal. 238, 70 Am. Dec. 775; *Byer v. Etnyre*, 2 Gill, 150, 41 Am. Dec. 410; *Winslow v. Madison*, 55 Cal. 8; *Willamette R. E. Co. v. Hendrix*, 28 Or. 485, 52 Am. St. Rep. 800.

of regularity. But public policy never requires that any man shall be secured the fruits of his own fraud, nor even the fruits of a fraud perpetrated by others, and brought within his knowledge at the time he made his investment. On the contrary, a sound public policy requires that every species of fraud shall be discouraged and punished. When, by any fraudulent contrivance, the purchaser at an execution sale has obtained an unconscionable advantage, equity will, beyond question, compel him to relinquish it. And perhaps the aid of equity need not be invoked. For the reported cases generally agree in affirming that a title acquired by execution sale, through the aid of false representations, or of any trick, device, imposture, or other fraud on the defendant in execution, is, while held by the guilty purchaser, utterly worthless and void.<sup>122</sup> And in order to be purged of the vices by which it was infected by the misconduct of the original

<sup>122</sup> *Gilbert v. Hoffman*, 2 Watts. 66, 26 Am. Dec. 103; *McKenna v. Pry*, 6 Watts, 137; *Bunts v. Cole*, 7 Blackf. 265, 41 Am. Dec. 226; *Bethel v. Sharp*, 25 Ill. 173, 76 Am. Dec. 790; *Gilbert v. Carter*, 10 Ind. 16, 68 Am. Dec. 655; *Turner v. Adams*, 46 Mo. 95; *Griffith v. Judge*, 49 Mo. 536; *Faust v. Haas*, 73 Pa. St. 295; 5 Leg. Gaz. 92; *Jones v. Fulgham*, 2 Murph. 364. If the fraud is in the judgment, equity will grant relief. See *Freeman on Judgments*, §§ 489-495; also, *Ingle v. McCurry*, 1 Helsk. 26; *Stubbs v. Leavitt*, 30 Ala. 352; *Tyler v. Tyler*, 1 Helsk. 734; *Newcomb v. Dewey*, 27 Iowa, 381; *Bridgeport S. B. v. Eldredge*, 28 Conn. 556, 73 Am. Dec. 688; *Kerr on Fraud and Mistake*, 44; *Munn v. Worrall*, 16 Barb. 221; *Burch v. Scott*, 1 Bland, 112; *Johnston v. Loop*, 2 Tex. 331; *Wilson v. Montgomery*, 14 Smedes & M. 205; *Moore v. Gamble*, 1 Stockt. Ch. 246; *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193; *Barnesly v. Powel*, 1 Ves. Sr. 119, 286; *Colclough v. Bolger*, 4 Dow, 54; *McMillan v. Reynolds*, 11 Cal. 372; *Galatian v. Erwin*, Hopk. Ch. 48; *Hayden v. Hayden*, 46 Cal. 332; *Martin v. Parsons*, 49 Cal. 94; *Brown v. Thornton*, 47 Ga. 474; *Ogden v. Larabee*, 57 Ill. 389; *Greene v. Haskell*, 5 R. I. 447; *Kent v. Ricards*, 3 Md. Ch. 392; *Hahn v. Hart*, 12 B. Mon. 426; *Warner v. Blakeman*, 4 Keyes, 507; *Barton v. Hunter*, 101 Pa. St. 406.

purchaser, it is essential that the title should be transferred in good faith, and upon a valuable consideration, to some person who is both guiltless and ignorant of those vices; for a purchaser with notice has no higher equity, and will receive no further protection, than a participant in the fraud.<sup>123</sup> If, on the other hand, there were fraudulent devices or tricks resorted to of which the purchaser had no notice, they cannot operate to impair his title. Having a perfect title, he may transfer a like title to any one else. Hence, it cannot be destroyed in the hands of his vendee by showing that the latter had notice of or even concurred in such tricks or devices.<sup>124</sup>

**§ 343. The Purchaser's Title cannot be Imperiled by Secret Vices.**—Purchasers in good faith need not look behind the judgment or decree under which a sale is to be made.<sup>125</sup> Attempts may be made to resist or annul the purchaser's title on the ground, 1. That the judgment was erroneous, fraudulent, or void; 2. That the issuing of the writ was unauthorized or irregular; or 3. That some vice attached to the proceedings taken for the purpose of satisfying such writ. In either event, the purchaser and his successors in interest are chargeable with knowledge of the facts disclosed by the record and the other papers upon which it is necessary for them to rely for the purpose of establishing their title, but they need not inquire respecting extrinsic facts, and their title is not subject to impeachment at law nor to annulment in equity because of such

<sup>123</sup> *Adams v. Secor*, 6 Kan. 542; *Kilgore v. Beck*, 40 Ga. 293; *Blivins v. Johnson*, 40 Ga. 297; *McMillan v. Reynolds*, 11 Cal. 372; *Snow v. Hawpe*, 22 Tex. 168.

<sup>124</sup> *Stuart v. Reed*, 91 Pa. St. 287.

<sup>125</sup> *Buckmaster v. Carlin*, 3 Scam. 104.

facts of which they were ignorant at the time of their purchase and payment. Relief against the judgment itself may be sought either by a motion to vacate it or by a suit to set it aside or otherwise deprive the purchaser of his right to rely upon it as a muniment of title. If he is an innocent purchaser, he may successfully resist either proceeding, though it is claimed that the court was without jurisdiction to enter the judgment,<sup>126</sup> or that the defendant was a married woman against whom the court had no authority to enter judgment,<sup>127</sup> or was an insane person, and the judgment was by confession,<sup>128</sup> or that the judgment was for some reason erroneous, and the facts existing at its rendition did not warrant the relief granted.<sup>129</sup> Though facts are disclosed requiring the vacation of the judgment and it is accordingly vacated, the title of an innocent purchaser will not be thereby destroyed.<sup>130</sup>

The same rule applies to the execution and the other proceedings subsequent to the judgment. Purchasers are not prejudiced by any secret vices, frauds, or defects therein.<sup>131</sup> The title derived under an execution

<sup>126</sup> *Linman v. Riggins*, 40 La. Ann. 761, 8 Am. St. Rep. 549; *Schmidt v. Nelmeier*, 100 Mo. 207; *Grimes v. Taft*, 98 N. C. 193; *Williams v. Johnson*, 12 N. C. 424, 34 Am. St. Rep. 513; *Walker v. Cronkite*, 40 Fed. Rep. 133; *Graff v. Louis*, 71 Fed. Rep. 591.

<sup>127</sup> *Shyrock v. Buckman*, 121 Pa. St. 248; *Focke v. Sterling*, 18 Tex. Civ. App. 8.

<sup>128</sup> *Crawford v. Thompson*, 161 Ill. 161.

<sup>129</sup> *Wash v. First N. B.*, 99 Ga. 592; *Wright v. Bruscoe*, 62 Ill. App. 358; *Massie v. Brady*, 41 La. An. 553; *Marrow v. Brinkley*, 85 Va. 55.

<sup>130</sup> *Schmidt v. Nelmeier*, 100 Mo. 207; *Keene v. Sallenbach*, 15 Neb. 200; *Scudder v. Sargent*, 15 Neb. 102.

<sup>131</sup> *Winston v. Otley*, 25 Miss. 451; *Natchez v. Minor*, 10 Smedes & M. 246; *Butterfield v. Walsh*, 36 Iowa, 534; *Mansfield v. Hoagland*, 46 Ill. 359; *Reeve v. Kennedy*, 43 Cal. 643; *Hamlin v. McCahill*, Clarke Ch. 249; *Freeman on Judgments*, §§ 509, 510;

sale cannot be defeated at law, nor vacated, restrained, nor otherwise impaired in equity, for fraud,<sup>132</sup> nor because the writ issued without the plaintiff's authority,<sup>133</sup> nor because the sale was conducted in violation of an agreement to adjourn it to another day,<sup>134</sup> unless the person by whom such title is held can be shown to have been cognizant of the fraud or irregularity for which it is sought to make him responsible. Neither failure of the sheriff to levy on personalty before selling real estate, nor defects in the notice of sale, will prejudicially affect the purchaser's title.<sup>135</sup> Where the law forbids a sale of land under a fieri facias without inquisition or waiver thereof, it appears that a purchaser, in the absence of such inquisition, assumes the risk of a valid waiver not having been made, and that his title may be defeated by proving that a waiver indorsed on the writ was a forgery.<sup>136</sup>

As against an innocent purchaser for value at an execution sale, it cannot be shown that the defendant in execution held the property upon certain trusts for the benefit of strangers to the action.<sup>137</sup> Where, by virtue of an execution sale, the legal title has become vested in the purchaser or his grantee, and an attempt is made in equity to restrain or control such title, the attempt must fail, unless the equity of the complainant

*Stokes v. Geddes*, 5 Pac. L. Rep. 133; 46 Cal. 17; *Thorpe v. Beavans*, 73 N. C. 241; *Carden v. Lane*, 48 Ark. 216; *Gunn v. Slaughter*, 83 Ga. 124; *Neigs v. Bunting*, 141 Pa. St. 233, 23 Am. St. Rep. 273.

<sup>132</sup> *Fetterman v. Murphy*, 4 Watts, 424, 28 Am. Dec. 729; *Drexel v. Man*, 6 Watts & S. 386, 40 Am. Dec. 573; *Beeson v. Beeson*, 9 Pa. St. 289; *Bull v. Sheredine*, 1 Har. & J. 410.

<sup>133</sup> *Sowles v. Harvey*, 20 Ind. 217, 83 Am. Dec. 315.

<sup>134</sup> *Williams v. Doran*, 23 N. J. Eq. 385.

<sup>135</sup> *Lawrence v. Grambling*, 13 S. C. 120.

<sup>136</sup> *Zuver v. Clark*, 104 Pa. St. 222.

<sup>137</sup> *Spinks v. Glenn*, 67 Ga. 744.



is superior to that of the holder of the title. If a purchaser delays payment until the time for redemption has expired, and then makes payment, and at once procures a conveyance, the owner of the property is, in equity, entitled to have the time for redemption computed from the day of the payment. But if the purchaser succeeds in selling his title to a third person, who buys in good faith, and without notice of any irregularity in the payment, and there is nothing in the records connected with the execution and sale calculated to give such notice, then the equity of such third person is at least as strong as that of the defendant in execution, and equity will not interpose to prevent the former from asserting his title against the latter.<sup>138</sup> The sheriff is not the agent of the purchaser. The latter's rights cannot be prejudiced by proving a notice given to the former.<sup>139</sup>

§ 344. Who is a Bona Fide Purchaser.—To entitle one to protection as a bona fide purchaser, three things are essential, to wit: 1. The purchase must be of the legal title; 2. It must be upon a sufficient consideration; and 3. It must be without notice, actual or constructive, of the title or equity against which it is sought to be enforced. Where the equities are equal, the first in order of time prevails.<sup>140</sup> Therefore, when the legal title is outstanding, the purchase of an equity is always limited to the title which the grantor in fact held. The purchaser of such a title is, in legal effect,

<sup>138</sup> *Maina v. Elliott*, 51 Cal. 8; *Greenville v. Cockerel*, 9 Chic. L. N. 292.

<sup>139</sup> *Stahle v. Spohn*, 8 Serg. & R. 317.

<sup>140</sup> *Phillips v. Phillips*, 4 De Gex, F. & J. 208; *Cave v. Cave*, L. R. 15 Ch. Div. 639; *Willes v. Cooper*, 24 Miss. 208; *Boone v. Chiles*, 10 Pet. 177; *Hallett v. Collins*, 10 How. 174.

a purchaser with notice of every pre-existing equity.<sup>141</sup> We apprehend that these principles, whose existence and application to voluntary transfers are unquestioned, are equally applicable to execution and other involuntary sales. The amount of consideration paid is material only so far as it may throw light on the actual good faith of the transaction. A purchaser has a legal right to acquire property on the most favorable terms which he can procure. But it is contrary to the usual course of business for a possessor to part with his property either for a grossly inadequate consideration, or for one materially less than could be realized at the time and place, by the exercise of reasonable diligence and forethought. The inadequacy of the consideration paid for property may, therefore, result in the purchaser being adjudged not to be a bona fide purchaser, because it may satisfy court or jury either that the purchaser knew of some vice or defect in the title, or that the willingness of the vendor to part with his property was so unusual as to put the purchaser on his guard, and to require him, as a prudent and honest buyer, to make further inquiry respecting the title.<sup>142</sup> As execution and judicial sales are made under compulsion, and, therefore, likely to result in some sacri-

<sup>141</sup> *Smith v. Altick*, 24 Ohio St. 377; *Eltner v. Fife*, 32 Ohio St. 873; *Polk v. Gallant*, 2 Dev. & B. Eq. 395, 34 Am. Dec. 410; *Winborn v. Gorrell*, 3 Ired. Eq. 117; *Perkins v. Hayes, Cooke*, 163, 5 Am. Dec. 680; *Craig v. Leiper*, 2 Yerg. 93, 34 Am. Dec. 479; *York v. McNutt*, 16 Tex. 13, 67 Am. Dec. 607; *Briscoe v. Ashby*, 24 Gratt. 478; *Jarman v. Farley*, 7 Lea, 141; *Stout v. Hyatt*, 13 Kan. 244; *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125; *Arnold v. Hagerman*, 45 N. J. Eq. 186, 14 Am. St. Rep. 712; *Peay v. Selgler*, 48 S. C. 496, 59 Am. St. Rep. 731; *Shoupe v. Griffiths*, 4 Wash. 161, 31 Am. St. Rep. 910.

<sup>142</sup> *De Witt v. Perkins*, 22 Wis. 473; *Anderson v. Nicholas*, 28 N. Y. 600; *Hoppin v. Doty*, 25 Wis. 573; *Sergeant v. Ingersoll*, 7 Pa. St. 343.

fice, inadequacy of price must be very gross indeed to denude the purchaser of the character of a purchaser in good faith, unless connected with facts tending to show that the inadequacy was the result of some fraudulent device, to which he contributed, or of which he had notice. Very frequently the amount bid is paid by a credit on the judgment, the plaintiff having become the purchaser. Then the question will arise whether this is such a payment as will entitle him to protection as a purchaser for value.

Where a purchaser, in consideration or as a result of his purchase, releases some valuable security, or places himself in a position substantially worse than the one previously occupied, he is unquestionably a purchaser for value.<sup>143</sup> But when payment is made by crediting a debtor with the amount of a pre-existing indebtedness, or, in the case of an execution sale, by crediting on the writ the amount of the plaintiff's bid, a slight preponderance of the authorities denies to the purchaser the protection of an innocent purchaser for value without notice,<sup>144</sup> while a large and apparently increasing minority dissents from this majority, and does not discriminate against a purchaser making payment with a pre-existing debt.<sup>145</sup>

<sup>143</sup> *Weaver v. Barden*, 49 N. Y. 292; *Hammond v. Bush*, 8 Abb. Pr. 168.

<sup>144</sup> *Devoe v. Brandt*, 53 N. Y. 466; *Padgett v. Lawrence*, 10 Paige, 170, 40 Am. Dec. 232; *Lockwood v. Bates*, 1 Del. Ch. 435, 12 Am. Dec. 121; *Dickerson v. Tillinghast*, 4 Paige, 215, 25 Am. Dec. 528; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. 103, 18 Am. Dec. 577; *Harris v. Horner*, 1 Dev. & B. Eq. 455, 30 Am. Dec. 182; *Williams v. Hollingsworth*, 1 Strob. Eq. 103, 47 Am. Dec. 527; *Cummings v. Boyd*, 83 Pa. St. 372; *Moore v. Ryder*, 65 N. Y. 438; *Union N. B. v. Oium*, 3 N. D. 193, 44 Am. St. Rep. 533.

<sup>145</sup> *Frey v. Clifford*, 44 Cal. 335; *Knox v. Clifford*, 38 Wis. 651; *Heath v. Silverthorn etc. Co.*, 39 Wis. 146; *Knox v. Hunt*, 18 Mo. 174; *Swift v. Tyson*, 16 Pet. 1; *Himmelmann v. Hotaling*, 40 Cal.

Lastly, the purchase must be made without notice of the adverse title or equity. Notice may consist of actual knowledge of facts stated in the public records, including recitals in the deeds and other writings under which the title must be deraigned, of all of which notice is indisputably attributed to the purchaser, whether he consulted them or not, and of information given him by one who is interested in the land, or derived from other sources worthy of credence. If the purchaser has knowledge of facts sufficient to excite the inquiry of a prudent man in regard to other facts, he will be charged with knowledge of such other facts as he might have learned by diligence.<sup>146</sup> "The true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that which he is about to purchase, he is presumed either to have made the inquiry, and ascertained the existence of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a bona fide purchaser. This presumption may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper diligence on his part."<sup>147</sup>

111; *Woodruff v. Hill*, 118 Mass. 310; *Maitland v. Citizens' Bank*, 40 Md. 540; *Gower v. Doheney*, 33 Iowa, 36; *Newman v. Davis*, 24 Fed. Rep. 609; *Bank v. Chambers*, 11 Rich. 657; *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. Rep. 497; *Harrold v. Kays*, 64 Mich. 439, 8 Am. St. Rep. 835.

<sup>146</sup> *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373; *Mercantile N. B. v. Parsons*, 54 Neb. 56, 40 Am. St. Rep. 299; *Kirsch v. Tozier*, 143 N. Y. 396, 42 Am. St. Rep. 729; *Anderson v. Blood*, 152 N. Y. 285, 57 Am. St. Rep. 515; *Doran v. Dazey*, 5 N. D. 167, 57 Am. St. Rep. 550; *Carneal v. Lynch*, 91 Va. 114, 50 Am. St. Rep. 819.

<sup>147</sup> *Williamson v. Brown*, 15 N. Y. 354; see note to *Lodge v. Simon-ton*, 23 Am. Dec. 47-53; *Converse v. Blumrich*, 14 Mich. 109, 90 Am. Dec. 230.

Notice is imputed to a purchaser when the person who has an adverse claim or lien is in possession of the property, or where, though not in possession, the existence of his right must be disclosed by an examination of the recorded title, for, if one is in possession of property, it is the duty of every person contemplating dealing with it to make some inquiry for the purpose of ascertaining by what right such possession is held, and, if he fails to make such inquiry, he is, nevertheless, charged with knowledge of such facts as the inquiry, if made, would probably have disclosed.<sup>148</sup> Every purchaser of real property, if he exercises reasonable diligence, must examine, or cause to be examined, the various documents appearing of record and constituting part of the chain of title of the person from whom the purchase is made. The purchaser is, therefore, conclusively presumed to have notice of such facts, material to the title, as such examination, if conducted, would have revealed.<sup>149</sup> These rules are applicable to purchasers at judicial and execution sales, and they apply with especial force to the judgment and the proceedings under which the sale is made. Of such equities and irregularities as these disclose the purchaser must be deemed to have notice, and he cannot escape the consequences of such presumed notice by proving that

<sup>148</sup> *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35; *Carr v. Brennan*, 166 Ill. 108, 57 Am. St. Rep. 119; *Tate v. Pensacola G. etc. Co.*, 37 Fla. 439, 53 Am. St. Rep. 251; *Gross v. State Bank*, 50 Minn. 234, 36 Am. St. Rep. 640; *Pleasants v. Blodgett*, 39 Neb. 714, 42 Am. St. Rep. 624.

<sup>149</sup> *Backer v. Pyne*, 130 Ind. 288, 30 Am. St. Rep. 231; *Sioux City etc. R. R. Co. v. Singer*, 49 Minn. 301, 32 Am. St. Rep. 554; *Kirsch v. Tozier*, 143 N. Y. 390, 42 Am. St. Rep. 729; *Parrish v. Mahany*, 10 S. D. 276, 66 Am. St. Rep. 715.

he was in fact inattentive to his interests, and, hence, remained ignorant of the rights so appearing.<sup>150</sup>

Notice need not have been received by the purchaser prior to the making of his bid. It is undoubtedly effective, if given at any time before he has made a payment upon such bid.<sup>151</sup> No one can be protected as purchaser without notice, unless, before receiving notice, he has paid a valuable consideration.<sup>152</sup> In fact, the mere parting with value seems not to be sufficient. The whole consideration agreed to be paid must, according to the majority of the authorities, have been paid before notice.<sup>153</sup> This rule is undoubtedly harsh; and a disposition is evident, where part of the consideration is paid before notice, to protect the purchaser *pro tanto*.<sup>154</sup>

<sup>150</sup> *Weber v. Clark*, 136 Ill. 256; *Jameson v. Rixey*, 94 Va. 342, 64 Am. St. Rep. 726.

<sup>151</sup> *Heck v. Fink*, 85 Ind. 6; *Warner v. Whittaker*, 6 Mich. 133, 72 Am. Dec. 65; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Doran v. Dazey*, 5 N. D. 167, 57 Am. St. Rep. 550.

<sup>152</sup> *Jackson v. Summerville*, 13 Pa. St. 359; *Williams v. Hollingsworth*, 1 Strob. Eq. 103, 47 Am. Dec. 527; *Molony v. Kernan*, 2 Dru. & W. 31; *Paul v. Fulton*, 25 Mo. 156; *Hutchins v. Chapman*, 37 Tex. 612; *Wormley v. Wormley*, 8 Wheat. 421; *Dillard v. Crocker*, 1 Spears Eq. 20; *Swayze v. Burke*, 12 Pet. 11; *Blight v. Banks*, 6 T. B. Mon. 192, 17 Am. Dec. 136; *Jewett v. Palmer*, 7 Johns. Ch. 65, 11 Am. Dec. 401; *Bush v. Bush*, 3 Strob. Eq. 131, 51 Am. Dec. 675; *Kilcrease v. Lum*, 36 Miss. 569; *Losey v. Simpson*, 3 Stockt. Ch. 246; *Vattler v. Hinde*, 7 Pet. 252.

<sup>153</sup> *Wood v. Mann*, 1 Sum. 506; *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280; *Dugan v. Vattler*, 3 Blackf. 245, 25 Am. Dec. 105; *Wormley v. Wormley*, 8 Wheat. 421; *Colquitt v. Thomas*, 8 Ga. 258; *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457.

<sup>154</sup> *Wells v. Morrow*, 38 Ala. 125; *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Pickett v. Barron*, 29 Barb. 505; *Youst v. Martin*, 3 Serg. & R. 423; *Lewis v. Bradford*, 10 Watts, 67; *Juvenal v. Jackson*, 14 Pa. St. 519; *Beck v. Urich*, 13 Pa. St. 636, 53 Am. Dec. 507; *Flagg v. Mann*, 2 Sum. 487; *Frost v. Beekman*, 1 Johns. Ch. 288; *Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314; *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29.

With respect to purchasers at execution sales, the general rule is, that they are bound by a notice which would bind a purchaser at a voluntary sale, and not bound by a notice which would not bind such purchaser.<sup>155</sup> We think an exception exists in favor of purchasers at execution sales. Generally, a purchaser must not only have made full payment of the purchase price, but he must also have received a conveyance and become thereby invested with the legal title before he becomes entitled to protection as a bona fide purchaser, and notice given to him of an adverse title, equity, or lien before receiving such conveyance is effective, though after full payment of the purchase price. In most of the states, the defendant in execution is entitled to a considerable period after the sale within which to redeem real property therefrom, and this renders the acquisition of the legal title impossible to the purchaser until after the lapse of such period, and if, in the meantime, notice could be given to him of adverse claims and equities, and his legal title, when subsequently acquired, made subject thereto, few persons would accept the hazards of bidding at an execution sale. The weight of authority recognizes the bidder at such sale as a purchaser from the moment of the payment of his bid, and exonerates him from the evil consequences of notice subsequently received by him, though before he has received, or become entitled to, a conveyance.<sup>156</sup>

<sup>155</sup> *Williamson v. Branch Bank*, 7 Ala. 906, 42 Am. Dec. 617; *Byers v. Engles*, 16 Ark. 543; *Shryock v. Jones*, 22 Pa. St. 303; *Barnes v. McClinton*, 3 Penr. & W. 67, 23 Am. Dec. 62; *Sergeant v. Ford*, 2 Watts & S. 126; *Hoffman v. Strohecker*, 9 Watts. 86, 32 Am. Dec. 740; *Yorke v. Briscoe*, 67 Ill. 533.

<sup>156</sup> *Duff v. Randall*, 116 Cal. 226, 58 Am. St. Rep. 158; *Luton v. Soper*, 94 Mich. 202; *Maroney v. Boyle*, 141 N. Y. 462, 38 Am. St. Rep. 821; *West v. Loeb*, 16 Tex. Civ. App. 399.

**§ 345. The Effect of a Reversal when a Stranger has Purchased.**—An erroneous judgment is the act of the court. Until vacated on appeal, or by some other appropriate proceeding, all persons may safely treat it as valid, unless we may except from this rule the parties to the suit and their attorneys, and even they are affected by its reversal no further than by being liable to make restitution of the property in their hands acquired under such judgment. But the distinction between a void and an erroneous judgment must be kept in view, for, if a judgment is void, no rights can be based upon it. The reversal of a judgment on appeal, on the ground, not of errors in proceeding, but because the lower court had no authority to proceed, would be in legal effect a declaration that the judgment was void. The judgment may not be wholly void, and yet be substantially so, because the parties whose interest was sought to be affected were not before the court. Their title cannot be imperiled, whether there is an appeal or not. If an appeal is taken, and a reversal ordered on this ground, the defect of parties is judicially declared.<sup>157</sup> Titles resting on such judgment will, therefore, be declared invalid. But this invalidity arises, not from the reversal, but from the original judgment, which is found to be so destitute of legal authority that it might have been disregarded by the parties, even if no proceedings had been taken for its reversal.

If a judgment is so far valid that it is necessary for the party against whom it is given to resort to an appeal to avoid its effect, he must, in order to prevent its execution, stay proceedings by giving a sufficient

<sup>157</sup> *Underwood v. Pack*, 23 W. Va. 704; *Turk v. Skiles*, 38 W. Va. 404; *Dunfee v. Childs*, 45 W. Va. 155.



undertaking on appeal. If he does not do this, an execution may be taken out and levied on his property. The officer serving the writ is justified in proceeding regardless of the appeal, and is not deprived of the protection of his process by the subsequent reversal of the judgment. Strangers to the suit may purchase at the sale. If so, their title will be valid, whether the judgment be affirmed or reversed.<sup>158</sup> As the sale may lawfully proceed, pending the appeal, where no stay bond has been given, public policy requires that all persons should have confidence in the title to be derived from the sale; otherwise but few would take the risk of purchasing, and the property would almost invari-

<sup>158</sup> Campbell v. McIver, 4 Hayw. (Tenn.) 60; Galpin v. Page, 1 Saw. 309; Coleman v. Trabue, 2 Bibb. 518; Hubbell v. Broadwell, 8 Ohio, 129; Coster v. Peters, 7 Robt. 386; 4 Abb. Pr., N. S., 53; Clark v. Bell, 4 Dana, 15; Hanschild v. Stafford, 27 Iowa, 301; Wood v. Jackson, 8 Wend. 9; Gott v. Powell, 41 Mo. 416; Dorsey v. Thomson, 37 Md. 25; Feaster v. Fleming, 56 Ill. 457; Fitzgibbon v. Lake, 29 Ill. 165, 81 Am. Dec. 302; Frost v. McLeod, 19 La. Ann. 69; Stinson v. Ross, 51 Me. 556, 81 Am. Dec. 591; Holland v. Adair, 55 Mo. 40; Wadhams v. Gay, 7 Chic. L. N. 169; McGuire v. Ely, Wright (Ohio), 520; Little v. Bunce, 7 N. H. 485, 28 Am. Dec. 363; Shields v. Powers, 29 Mo. 315; Lovett v. Reformed Church, 12 Barb. 67; Taylor v. Boyd, 3 Ohio, 337, 17 Am. Dec. 603; Goudy v. Hall, 36 Ill. 313, 87 Am. Dec. 217; Goodwin v. Mix, 38 Ill. 115; Barney v. Patterson, 6 Har. & J. 182; Reardon v. Searcy, 2 Bibb. 202; Ward v. Hollins, 14 Md. 158; Burd v. Dansdale, 2 Binn. 80; Estes v. Boothe, 20 Ark. 583; Gray v. Brignardello, 1 Wall. 627; Morgan v. Mason, 20 Ohio, 401; Garrett v. Lynch, 45 Ala. 204; Pitfield v. Gazzam, 2 Ala. 325; Sutton v. Schonwald, 86 N. C. 198, 41 Am. Rep. 455; Gibson v. Lyon, 115 U. S. 439; Jermon v. Lyon, 81 Pa. St. 107; Schultz v. Sanders, 38 N. J. Eq. 154; Sneed v. Reardon, 1 A. K. Marsh. 217; Farmer v. Rogers, 10 Cal. 335; Bank of U. S. v. Bank of Washington, 6 Pet. 8; Kissock v. Grant, 34 Barb. 144; Jessup v. City Bank, 15 Wis. 604, 82 Am. Dec. 703; Storm v. Smith, 43 Miss. 497; Shackelford v. Hunt, 4 B. Mon. 262; Corwithe v. State Bank, 18 Wis. 560, 86 Am. Dec. 793; Gibson v. Winslow, 38 Pa. St. 49; Ponder v. Moseley, 2 Fla. 207, 48 Am. Dec. 194; Fergus v. Woodworth, 44 Ill. 374; Brown v. Combs, 7 B. Mon. 321; Magruder v. Peter, 11 Gill & J. 217; Vogler v. Montgomery, 54 Mo. 577, 13 Am. Law Reg. 244; contra, Wambaugh v. Gates, 8 N. Y. 144.

ably be sold at a grossly inadequate price. All strangers to the suit are encouraged to bid, and their title is in no way impaired by their knowledge that an appeal was pending, or, if not pending, that it would be taken.<sup>159</sup> The code of Iowa declares that "property acquired by a purchaser in good faith, under a judgment subsequently reversed, shall not be affected by such reversal." The courts of that state have determined that a purchaser who has not paid the entire amount of his bid is not a purchaser in good faith, and, therefore, not entitled to the benefit of this provision.<sup>160</sup> The vacation of a judgment, otherwise than by appeal, unless upon the ground that it was void, will not destroy the title of an innocent purchaser under a sale made prior to such vacation.<sup>161</sup> In a few of the states, the right of a purchaser, though not a party to the action, may be destroyed by an appeal, unless he is a purchaser without notice of the errors or irregularities on account of which the reversal is directed.<sup>162</sup>

If it is not the decree or judgment under which the sale is made that is reversed, but only the order confirming the sale, the purchaser's title fails, because it is dependent on the order of confirmation, and this order has been held not to fall within the policy of the decisions and statutes protecting purchasers at judicial sales from the consequences of subsequent reversals.<sup>163</sup>

<sup>159</sup> *Irwin v. Jeffers*, 3 Ohio St. 389; *Phillips v. Benson*, 85 Ala. 416; *Gould v. Sternberg*, 128 Ill. 510, 15 Am. St. Rep. 138; *Maynard v. May* (Ky.), 25 S. W. 879; *Benson v. Yellott*, 76 Md. 159; *Kramer v. Wellendorf*, 129 Pa. St. 547; *Shannon v. Newton*, 132 Pa. St. 375; *Micou v. Davis*, 16 Lea, 257.

<sup>160</sup> *O'Brien v. Harrison*, 59 Iowa, 689.

<sup>161</sup> *Watson v. Ulbrich*, 18 Neb. 186; *Moore v. Woodall*, 40 Ark. 42.

<sup>162</sup> *Winterson v. Hitchings*, 30 N. Y. Supp. 260; *Effinger v. Kenny*, 92 Va. 245; *Turk v. Skiles*, 38 W. Va. 404.

<sup>163</sup> *Sinnett v. Crolde*, 4 W. Va. 600; *Dunfee v. Childs*, 45 W. Va. 155; *Central T. Co. v. Hubinger*, 87 Fed. Rep. 8.

A redemptioner is entitled to protection as a purchaser, and his rights as such are not impaired by a reversal after he has effected his redemption of the judgment under which the sale from which he redeemed was made.<sup>164</sup>

§ 346. Enforcing Restitution after Reversal.—Upon the reversal of a judgment after a sale has been made under execution to a stranger to the suit, the defendant must seek redress from the plaintiff. This redress was formerly obtained by a *scire facias quare restitutionem non*. This is still the remedy in some states in cases where the record does not show that the money realized from the sale has been paid to the plaintiff.<sup>165</sup> Where the plaintiff has received the proceeds of the sale, the defendant may recover in an action for money had and received.<sup>166</sup> If, however, the money, after being paid to plaintiff, is by him paid to a third person, it cannot be recovered from such person, though he was one of the plaintiff's attorneys.<sup>167</sup> The right to recover of the plaintiff is perfect upon the reversal of the judgment. It then becomes his duty to restore everything of value taken under such judgment, without waiting for any demand on him therefor. Hence, in an action for the continued holding of the property, no demand need be alleged or proved.<sup>168</sup> A question of importance in connection with this subject is, whether the plaintiff must account to the defendant for the real value of the

<sup>164</sup> *Hudepohl v. Liberty Hill Co.*, 94 Cal. 588, 28 Am. St. Rep. 149; *White v. Leeds L. Co.*, 72 Minn. 352, 71 Am. St. Rep. 488; *Ryan v. Staples*, 78 Fed. Rep. 563.

<sup>165</sup> *Eubank v. Ralls*, 4 Leigh, 308.

<sup>166</sup> *Clark v. Pinney*, 6 Cow. 297; *Greene v. Stone*, 1 Har. & J. 405; *Magbee v. Kellogg*, 24 Wend. 32.

<sup>167</sup> *Langley v. Warner*, 3 N. Y. 327.

<sup>168</sup> *Zimmerman v. Winterset Bank*, 56 Iowa, 133.

property sold, or for the sum which it brought at the sale. In California, it has been assumed that an action may be sustained to recover the damages suffered from the sale.<sup>169</sup> In other states, the plaintiff may exonerate himself by paying the amount for which the property sold, with interest from the date of the sale.<sup>170</sup> In two of the cases cited as sustaining a recovery for the actual damages suffered by the sale, it had been made to the plaintiff, and the defendant, instead of seeking to recover the property, had elected to maintain an action for the damages accruing to him from the sale,<sup>171</sup> and it may be that the measure of damages differs in actions of this character from those in which it appears that the property has been sold to a stranger to the suit, for, as when the property has been sold to the plaintiff, the defendant, after reversal, may sue for and recover it in specie, there seems to be no special hardship in permitting him to recover the damages resulting from the sale, if he elects to affirm it, because these damages must ordinarily be the value of the property, with, perhaps, interest added, from the date of the sale.

In California, however, the code seems to have modified the common-law rule, and made the decisions hereinbefore cited inapplicable to controversies arising after its enactment. This code now provides that when a judgment or order is reversed or modified, the appellate court may make complete restitution of all prop-

<sup>169</sup> *Reynolds v. Hosmer*, 45 Cal. 616; *Hayes v. Cassell*, 70 Ill. 669; *Gould v. Sternberg*, 128 Ill. 510, 15 Am. St. Rep. 138; *Maynard v. May* (Ky.), 25 S. W. 879; *Fush v. Eagan*, 48 La. Ann. 60.

<sup>170</sup> *Peck v. McLean*, 36 Minn. 228, 1 Am. St. Rep. 665; *McGuire v. Ely*, *Wright* (Ohio), 520; *Gay v. Smith*, 38 N. H. 171; *Bryant v. Fairfield*, 51 Me. 154; *Eames v. Stevens*, 26 N. H. 117; *Goodyere v. Ince*, Cro. Jac. 246; *Trow v. Messer*, 32 N. H. 361.

<sup>171</sup> *Reynolds v. Hosmer*, 45 Cal. 616; *Hayes v. Cassell*, 70 Ill. 669.

erty and rights lost by the erroneous judgment or order, so far as restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon it, on the appeal from which the proceedings were not stayed, "and for relief in such cases, the appellant may have an action against the respondent, enforcing the judgment for the proceeds of the sale of the property, after deducting therefrom the expenses of the sale."<sup>172</sup> This section apparently restricts, in this state, the recovery of the appellant to the proceeds of the sale, less the expenses thereof. The Code of Civil Procedure of New York declares that when a final judgment or order is reversed or modified upon appeal, the appellate court, or the general term of the same court, as the case may be, may make or compel restitution of the property or of the right lost by means of the erroneous judgment or order, but not so as to affect the title of a purchaser in good faith and for value. Where property has been sold, the court may compel the value or the purchase price to be restored or deposited, to abide the event of the judgment, as justice requires.<sup>173</sup> This section, it will be observed, seems to authorize the court, at its discretion, to compel the restoration either of the value or of the purchase price of the property, without disclosing any rule to control the exercise of such discretion. It has been held in this state that the remedy provided by the statute is cumulative merely, and, therefore, does not impair the right of the appellant to resort to another and pre-existing remedy to which he was entitled before the enactment of the statute.<sup>174</sup>

<sup>172</sup> C. C. P. of Cal., § 957.

<sup>173</sup> C. C. P. N. Y., § 1323.

<sup>174</sup> *Haebler v. Myers*, 132 N. Y. 363, 28 Am. St. Rep. 589.

§ 347. **The Effect of a Reversal when Plaintiff or his Attorney is the Purchaser.**—The party in whose favor a judgment was rendered must, on its reversal, make restitution of all things in his control which he has acquired thereby. If lands have been set off to plaintiff under execution, or if he has purchased real or personal estate, the defendant, on the reversal of the judgment, becomes entitled to such real or personal property. In other words, the owner of the judgment, whether he be the original plaintiff,<sup>175</sup> or one to whom the judgment has been assigned by such plaintiff,<sup>176</sup> purchases subject to the risk of losing title by the subsequent reversal of the judgment. It may happen that before proceedings are taken against a purchasing plaintiff whose judgment was reversed that he has procured another of similar character against the defendant whose property was sold. This does not validate the title based upon the judgment which was reversed.<sup>177</sup> If, however, the party seeking restitution resorts to an independent suit, it is said that relief will be denied him, except upon the condition that he will do equity by satisfying the judgment which has been recovered against him after the reversal of the first judgment.<sup>178</sup>

<sup>175</sup> *Muson v. Plummer*, 58 Iowa, 736; *McDonald v. Mobile L. I. Co.*, 65 Ala. 358; *Mullin v. Atherton*, 61 N. H. 20; *Gott v. Powell*, 41 Mo. 416; *Buchanan v. Clarke*, 10 Gratt. 164; *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358; *Dater v. Troy T. & R. R. Co.*, 2 Hill, 629; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Corwith v. State Bank*, 15 Wis. 289; *Graham v. Eagan*, 15 La. Ann. 97; *Bank of U. S. v. Bank of Washington*, 6 Pet. 8; *Twogood v. Franklin*, 27 Iowa, 239; *Hubbell v. Broadwell*, 8 Ohio, 127; *Hayes v. Cassell*, 6 Chic. L. N. 183; *Holland v. Adair*, 55 Mo. 40; *Purser v. Cady*, 120 Cal. 214; *Kingsbury v. Stoltz*, 23 Ill. App. 411; *Wall v. Dodge*, 3 Utah, 168; *Benney v. Clein*, 15 Wash. 581; *Singly v. Warren*, 18 Wash. 434, 63 Am. St. Rep. 896; *Dunfee v. Childs*, 45 W. Va. 155.

<sup>176</sup> *Reynolds v. Hosmer*, 45 Cal. 630; *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449.

<sup>177</sup> *Kingsbury v. Stoltz*, 23 Ill. App. 411.

<sup>178</sup> *Winterson v. Hitchins*, 30 N. Y. Supp. 260.

If the property, after being bought by the plaintiff is, before the reversal, transferred by him in good faith, and for valuable consideration, to a stranger to the suit, it appears that the latter acquires title free from the contingency of the reversal.<sup>179</sup> This rule does not prevail where lands are taken under a *elegit*, or extended by virtue of the statutes in force in the New England states. Here the lands are not sold, but are given directly to the plaintiff, in satisfaction of his writ. The continuance of the title depends upon the continuance of the judgment. When the judgment is discontinued, by virtue of its reversal, the title reverts in the defendant in execution, whether the plaintiff has, in the mean time, made any conveyance or not.<sup>180</sup> The plaintiff's attorney, on becoming a purchaser at a sale under execution in a case which he has conducted, occupies a position as unfavorable as that of the plaintiff, and must lose the property upon the reversal of the judgment.<sup>181</sup>

In some cases, persons other than the plaintiff may be interested in the enforcement of the judgment. The various lienholders may be made parties defendant, and may, under the decree entered in the case, be entitled to some portion of the proceeds of the sale, in the event of the property selling for more than suffi-

<sup>179</sup> *Guiteau v. Wiseley*, 47 Ill. 433; *McAusland v. Pundt*, 1 Neb. 211, 93 Am. Dec. 358.

<sup>180</sup> *Goodyere v. Ince*, Cro. Jac. 246; 2 Brownl. 208; *Ognell's Case*, Cro. Eliz. 270; *Bryant v. Fairfield*, 51 Me. 154; *Eyre v. Woodfine*, Cro. Eliz. 278; *Delano v. Wilde*, 11 Gray, 17, 71 Am. Dec. 687; *Sympton v. Juxon*, Cro. Jac. 699; *Cummings v. Noyes*, 10 Mass. 434.

<sup>181</sup> *Galpin v. Page*, 18 Wall. 350; *Stroud v. Casey*, 25 Tex. 754, 78 Am. Dec. 556; *Hannibal & St. J. R. R. Co. v. Brown*, 43 Mo. 294; *Twogood v. Franklin*, 27 Iowa, 239; *Hayes v. Cassell*, 6 Chic. L. N. 183; *Mitchell v. Hardie*, 84 Ala. 349; *Mullin v. Atherton*, 61 N. H. 20.

cient to satisfy all liens prior to theirs. Such a lienholder, though a party to the judgment, may purchase at the sale, and will, it seems, hold the property, notwithstanding the reversal of the judgment, if the proceeds of the sale were distributed among the other lienholders.<sup>182</sup> But if he received the chief benefit of the proceeds of the sale, he must make restitution of the property purchased.<sup>183</sup> In Kentucky the plaintiff's title held under an execution sale is not divested by a reversal of his judgment.<sup>184</sup> The opinion of the courts of Kentucky upon this subject was approved by Judge Field of the supreme court of the United States, in one instance;<sup>185</sup> but he subsequently changed his views, and acquiesced in the doctrines sustained by the other authorities.<sup>186</sup>

It has sometimes been held that the reversal of a judgment does not, of itself, divest the title of a plaintiff

<sup>182</sup> *McBride v. Longworth*, 14 Ohio St. 349, 84 Am. Dec. 383.

<sup>183</sup> *Walpole v. Ink*, 9 Ohio, 143.

<sup>184</sup> *Parker v. Anderson*, 5 T. B. Mon. 455; *Benningfield v. Reed*, 8 B. Mon. 105; *Gossom v. Donaldson*, 18 B. Mon. 230, 68 Am. Dec. 723; *Yocum v. Foreman*, 14 Bush. 494. The courts of this state have, however, hesitated to apply the rule proclaimed by them, when, to do so, must result in manifest injustice. Under a judgment against B. the plaintiff levied upon, sold, and became the purchaser of two tracts of land which had been conveyed by the defendant to C. and J. This judgment was subsequently reversed, and upon a new trial it was found that nothing was due to the plaintiff from the defendant, and that the plaintiff was insolvent. The question then arose whether the sale of these two tracts should be set aside. The court, referring to its former decisions, insisted that, in so far as they denied the right of restitution, they could not be extended to persons not parties to the action, but whose property had been sold under the judgment therein, and that the restitution must be ordered, because otherwise a gross wrong would be done to persons who were not parties to the action, and who, because of the plaintiff's insolvency, would otherwise be without means of redress. *Baker v. Baker*, 87 Ky. 461.

<sup>185</sup> *South Fork Canal Co. v. Gordon*, 2 Abb. 479, 482.

<sup>186</sup> *Galpin v. Page*, 18 Wall. 350.



who has purchased; that the sale remains in force until vacated on motion; and that the defendant, instead of making such motion, may affirm the sale, and sue the plaintiff for the damages suffered thereby.<sup>187</sup> If in a suit to foreclose a mortgage a decree is entered directing the sale of the property and the appropriation of the proceeds between two mortgagees, and one of them appeals and secures a reversal on the ground of error in not awarding him priority in such distribution, but the mortgagor is not a party to the appeal, the reversal does not vacate the sale though made to the other mortgagee.<sup>188</sup>

The judgment may be reversed in part only, as where the amount of a mortgage foreclosure is reduced upon appeal. In such case it has been held that, because all ground for the sale was not destroyed, it would be permitted to stand, although the plaintiff was the purchaser, unless "it should be shown that there was some unfairness in the sale, or that the property would, on a resale, bring a larger amount than the bid at the first sale."<sup>189</sup> Probably the mere showing that the property would bring a greater sum on a resale does not entitle the appellant to the vacating of the sale, and his sole remedy is to maintain an action for any sum collected by the respondents in excess of that found due by the appellate court.<sup>190</sup> Where a judgment directs a sale of specific property, and is on appeal reversed as to such direction, but the right of the respon-

<sup>187</sup> *Johnson v. Lamping*, 34 Cal. 293; *Reynolds v. Hosmer*, 45 Cal. 616.

<sup>188</sup> *Withers v. Jacks*, 79 Cal. 297, 12 Am. St. Rep. 143.

<sup>189</sup> *Jesup v. City Bank*, 15 Wis. 604.

<sup>190</sup> *Hewitt v. Dean*, 91 Cal. 617, 25 Am. St. Rep. 227; *Mitchell v. Weaver*, 118 Ind. 55, 10 Am. St. Rep. 104.

dent to a money judgment is sustained, it has been held that his title is destroyed by the reversal.<sup>191</sup>

Can a plaintiff purchasing at a sale under his own judgment, and, therefore, subject to the loss of his title by its reversal, transfer to another a title free from this hazard? There are, indeed, several decisions apparently putting one purchasing from the plaintiff under such circumstances, especially before an appeal has been taken or a writ of error sued out, on the same footing as if he had himself been the purchaser at the original sale,<sup>192</sup> but surely all persons are chargeable with notice of the law, and, hence, of the times within which appeals may be perfected or writs of error prosecuted, and that the title held by the plaintiff is subject to destruction by the reversal of the judgment upon which it rests. Public policy does not require that third persons shall purchase his title, or, if they do so, that they shall acquire it free from the risks upon which he held it, and we believe the better opinion is, that any purchaser from the plaintiff necessarily receives the title subject to the conditions under which it was held by him.<sup>193</sup>

**§ 348. Transfers of Shares in Corporations.**—The ordinary property of a corporation may be transferred under execution, in like manner and with like effect as the property of a private person.<sup>194</sup> Its franchises, how-

<sup>191</sup> *Adams v. Odum*, 74 Tex. 206, 15 Am. St. Rep. 827.

<sup>192</sup> *McCormack v. McClure*, 6 Blackf. 466, 39 Am. Dec. 441; *Taylor's Lessee v. Boyd*, 3 Ohio, 354, 17 Am. Dec. 603; *McAusland v. Fundt*, 1 Neb. 211, 93 Am. Dec. 358.

<sup>193</sup> *Marks v. Cowles*, 61 Ala. 299; *Bryant v. Fairfield*, 51 Me. 149; *Singly v. Warren*, 18 Wash. 434, 63 Am. St. Rep. 896.

<sup>194</sup> *Pierce v. Partridge*, 3 Met. 44; *Perry v. Adams*, 3 Met. 51; *Regina v. Victoria P. Co.*, 4 Perry & D. 639; 1 Q. B. 288; *Arthur v. C. & R. Bank*, 9 Smedes & M. 394, 48 Am. Dec. 719; *Boyd v.*

ever, are subject to execution only where they have been made so by statute; and the statutes enacted for this purpose, being in derogation of the common law, are strictly construed.<sup>195</sup> The sale of the franchise and property of a corporation, though it may in effect render the corporation powerless to proceed with its business or to perform any of its functions, does not transfer or destroy its corporate existence.<sup>196</sup> The certificates of stock of corporations are considered as being somewhat similar in their nature to choses in action, and have, on that account, uniformly been held incapable of transfer under execution, except where such transfer has been authorized by statute.<sup>197</sup> But statutes authorizing the levy and sale of shares of the stock of corporations, and pointing out the methods by which such levy and sale may be consummated, have been enacted in most of the states.<sup>198</sup>

The title of the purchaser is, where the statute has been pursued, governed by substantially the same rules applicable to other property. In the absence of any statute expressly or impliedly exempting execution sales of stock in corporations from the rules applicable to like sales of other personal property, the title of the purchaser must necessarily be determined by the rules controlling sales of other chattels. Hence, it must be

Chesapeake Co., 17 Md. 195, 79 Am. Dec. 646; *State v. Bank of Maryland*, 6 Gill & J. 219, 26 Am. Dec. 561; *Slee v. Bloom*, 19 Johns. 475, 10 Am. Dec. 273; *Franklin T. Co. v. Young*, 8 Humph. 104; *Angell and Ames on Corporations*, § 640.

<sup>195</sup> *James v. Pontiac R. R. Co.*, 8 Mich. 91.

<sup>196</sup> *State v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561.

<sup>197</sup> *Howe v. Starkweather*, 17 Mass. 240; *Denton v. Livingston*, 9 Johns. 96, 6 Am. Dec. 264; *Williamson v. Smoot*, 7 Mart. (La.) 31, 12 Am. Dec. 494; *Foster v. Potter*, 37 Mo. 525; *Angell and Ames on Corporations*, § 588.

<sup>198</sup> *Angell and Ames on Corporations*, § 589.

fatal to his title that the defendant in execution had transferred his interest prior to the levy of the writ. But in a majority of the states statutes have been enacted declaring that transfers of stock shall not be valid, except between the parties thereto, until entered upon the books of the corporation. Respecting the effect of statutes of this character different views prevail. According to the opinion which we think to be less sustained by reason and authority than the contrary view, these statutes operate merely for the protection of the corporation and purchasers, and not for that of the creditors of the stockholders, and, hence, it is insisted that a purchaser at an execution sale takes subject to all prior transfers and liens, whether they are entered upon the books of the corporation or not, though at the time of his purchase he had no notice of them.<sup>199</sup> A considerable preponderance of the decisions, however, holds that these statutes operate for the protection of purchasers at execution sales either on the ground that it is incumbent on a purchaser of stocks, like a purchaser of other personal property, to make a change of possession and control corresponding to the change in the ownership, and to thereby give notice to third persons of the transfer of title, or that the statutes are intended to operate substantially like those requiring transfers of real property to be attended with certain formalities and to be recorded in some public office. In some of the states, the levy of the writ gives the judgment creditor a lien and the purchaser at the sale a title paramount to transfers made

<sup>199</sup> *Thurber v. Crump*, 86 Ky. 408; *Clark v. German S. B.*, 61 Miss. 611; *Beckwith v. Burroughs*, 13 R. I. 294; *Cornich v. Richards*, 8 Lea, 1; *Young v. South T. I. Co.*, 85 Tenn. 189. 4 Am. St. Rep. 752; *Port Townsend N. B. v. Port Townsend G. & F. Co.*, 6 Wash. 497.

prior to the levy of the writ, though notice thereof was given before the sale, or the evidence of the transfer was appropriately entered on the books of the corporation prior to the execution sale, but, generally, it is sufficient to give such notice or to procure such entry prior to the sale. In either of these events the title of the purchaser is subject to the transfer.<sup>200</sup> Where, on the other hand, the transfer is not so perfected, nor notice brought home to the purchaser prior to the payment of his bid, his title is not affected by secret transfers and liens of which he had no notice, and which did not appear on the books of the corporation,<sup>201</sup> except when there is no provision in the statutes of the state, nor in the charter or by-laws of the corporation, requiring a transfer or lien to appear on the books of the corporation.<sup>202</sup> The title of the purchaser cannot be impaired where the levy was made in the mode prescribed by law by a sale made after such levy, though to an innocent purchaser for value.<sup>203</sup> On the other hand, the purchaser takes his title subject to all known transfers and liens, whether attested on the books of the corporation or not.<sup>204</sup> On the presentation of an officer's

<sup>200</sup> *Nicollet N. B. v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643; *Lund v. Wheaton R. Co.*, 50 Minn. 36, 36 Am. St. Rep. 623; *Wilson v. St. Louis etc. R. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624.

<sup>201</sup> *Weston v. Bear River Co.*, 5 Cal. 425, 63 Am. Dec. 117; *Strout v. Natoma W. & M. Co.*, 9 Cal. 78; *Nagler v. Pacific W. Co.*, 20 Cal. 529; *Conway v. John*, 14 Colo. 33; *Dutton v. Connecticut Bank*, 13 Conn. 493; *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161; *People's Bank v. Gridley*, 91 Ill. 457; *Fort Madison L. Co. v. Batavia Bank*, 71 Ia. 270, 60 Am. Rep. 789; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Fisher v. Essex Bank*, 5 Gray, 373; *Blanchard v. Denham G. L. Co.*, 12 Gray, 213; *In re Argus P. Co.*, 1 N. D. 444, 26 Am. St. Rep. 647; *Application of Murphy*, 51 Wis. 519.

<sup>202</sup> *Sargent v. Essex M. R. Co.*, 9 Pick. 201; *Boston Music Hall v. Cory*, 129 Mass. 435.

<sup>203</sup> *Shenandoah V. R. Co. v. Griffith*, 76 Va. 913.

<sup>204</sup> *McClintock v. Central Bank (Mo.)*, 24 S. W. 1052; *Barse L. &*

certificate of purchase, showing a transfer by execution, it is the duty of the officers of the corporation to make a corresponding transfer on its books.<sup>205</sup>

**§ 349. Purchaser's Right to Rents and Profits before Redemption.**—Generally, purchasers at execution sales are neither entitled to the possession of the property purchased, nor to participate in the rents and profits thereof, until their title has become absolute by the failure of the persons interested to redeem within the time prescribed by law. Upon the happening of that event, their right to all subsequently accruing rents becomes perfect and indefeasible. In involuntary as well as in voluntary transfers the rent is an incident to the reversion, and passes with it.<sup>206</sup> There is some doubt respecting the application of the law of relation to the purchaser's right to rents of the property sold. His right necessarily becomes perfect at the time when, by an execution of the conveyance to him, he is vested with the legal title and the right of possession, but for some purposes his conveyance takes effect either from the time of his purchase or from the date of the incep-

Co. v. Range V. O. Co., 16 Utah, 59; Weston v. Bear River Co., 6 Cal. 425, 63 Am. Dec. 117; Blakeman v. P. S. I. Co., 72 Cal. 321. Hence if a corporation has a lien upon stock by its rules or by-laws, to secure debts due to it from its stockholders, it is entitled to enforce such lien against a purchaser at an execution sale. Angell and Ames on Corporations, § 589; Mechanics' Bank v. Merchants' Bank, 45 Mo. 513, 100 Am. Dec. 388; Perpetual Ins. Co. v. Goodfellow, 9 Mo. 149; Sewall v. Lancaster Bank, 17 Serg. & R. 285; Grant v. Mechanics' Bank, 15 Serg. & R. 140; West Branch Bank v. Armstrong, 40 Pa. St. 278; Jennings v. Bank of California, 79 Cal. 323, 12 Am. St. Rep. 145.

<sup>205</sup> Bailey v. Strohecker, 38 Ga. 258, 95 Am. Dec. 388; Townsend v. Isenberger, 45 Ia. 670; Martin v. Martin, 7 Md. 368, 61 Am. Dec. 364; Van Wicklen v. Paulson, 14 Barb. 654; Bank of Pa. v. Wise, 8 Watts, 394.

<sup>206</sup> Latta v. Pierce, 11 Lea, 267; Butt v. Elliott, 19 Wall. 544.

tion of the lien for the discharge of which the sale was made. The statutes of Massachusetts expressly provide that the judgment debtor is entitled to rents from a lessee in possession of the premises from the date of the levy, except such part as has been paid before receiving notice thereof.<sup>207</sup> In several of the states, a sheriff's deed has been held to entitle the grantee to rents from the date of the sale, on the ground that it operates by relation as of that day as a conveyance of the legal title and the consequent right to the rents.<sup>208</sup> In some cases the date to which the deed relates for the purpose of transfer and the right to the rents has been held to be that of the confirmation, and not of that of the sale.<sup>209</sup>

In several of the states, statutes have been enacted giving to purchasers at execution sales the right from the day of the sale to the rents and profits of the real estate sold.<sup>210</sup> If a tenant is in possession, the purchaser may, even before the expiration of the time for redemption, compel the rent to be paid to him, whenever it falls due.<sup>211</sup> If the defendant redeems, he is nevertheless responsible to the purchaser for rents accruing after the sale, and before the redemption.<sup>212</sup> A redemptioner is not, on redemption being made from him, under any obligation to return, or account for,

<sup>207</sup> Public Stats. Mass., 1882, p. 101, §18.

<sup>208</sup> *Davis v. Newcomb*, 72 Ind. 413; *Missouri V. L. Co. v. Barwick*, 50 Kan. 57; *Wright v. Williams*, 7 Lea, 700.

<sup>209</sup> *Pearson v. Gillenwaters*, 99 Tenn. 146, 63 Am. St. Rep. 844.

<sup>210</sup> *Stayton v. Morris*, 4 Harr. (Del.) 224; *Borell v. Dewart*, 37 Pa. St. 136; *Emerson v. Sansome*, 41 Cal. 552; *McDevitt v. Sullivan*, 8 Cal. 592; *Webster v. Cook*, 38 Cal. 423; *Kirkpatrick v. Boyd*, 90 Ala. 449; *Clement v. Shipley*, 2 N. D. 430; *Rudolph v. Herman*, 4 S. D. 283; *Hardy v. Herriott*, 11 Wash. 461.

<sup>211</sup> *Walker v. McCusker*, 71 Cal. 596; *Kane v. Mink*, 64 Ia. 84; *Reynolds v. Lathrop*, 7 Cal. 43.

<sup>212</sup> *Kline v. Chase*, 17 Cal. 596; *Knight v. Truett*, 18 Cal. 113.

rents collected, where the statute does not create such an obligation.<sup>213</sup> It is, however, obviously inequitable to permit a purchaser or redemptioner to receive rents and also to exact the same amount for redemption as if such amounts had not been received. Hence, the enactment, in some of the states, of statutes providing that when redemption is sought to be made, the person entitled to receive the money to be paid must first account for rents and profits paid him.<sup>214</sup> The person in possession is not, even in foreclosure cases, liable for the rents and profits anterior to the sale.<sup>215</sup> Rents and profits accruing before the execution of the deed cannot be recovered in ejectment by the purchaser. They must be secured by an independent action based upon the liability created by the statute.<sup>216</sup> The purchaser is entitled to such equitable remedies as may be requisite to secure him his statutory right to the rents and profits. He may, therefore, by bill in equity, compel the persons in possession to account with him,<sup>217</sup> or may procure the appointment of a receiver, where the defendant or tenant in possession is insolvent.<sup>218</sup> He cannot recover in an action of contract against any person in possession of premises not held under a lease or other contract. The purchaser's remedy in such a case, though the person remaining in possession is the judgment debtor, must be an action to recover the value of the use and occupation or the damages resulting from

<sup>213</sup> *Knipe v. Austin*, 13 Wash. 194; *Hardy v. Herriot*, 11 Wash. 460.

<sup>214</sup> C. C. P. Cal., §707.

<sup>215</sup> *Whitney v. Allen*, 21 Cal. 233.

<sup>216</sup> *Henry v. Evarts*, 30 Cal. 425. The statute allowing purchasers rents and profits does not apply to tax sales. *Mayo v. Woods*, 31 Cal. 269.

<sup>217</sup> *Harris v. Reynolds*, 13 Cal. 514, 73 Am. Dec. 600.

<sup>218</sup> *Hill v. Taylor*, 22 Cal. 191.



the withholding of possession, unless some statute has created some other remedy.<sup>219</sup>

Whatsoever the nature of the action brought by a purchaser to recover either the rents of the property or the value of its use and occupation, he is likely to be met with the claim that the defendant holds possession under some lease or other contract made by the judgment debtor prior to the execution sale or to the making of the sheriff's deed, and that the defendant has, by the payment of rents in advance or of some other valuable consideration, become entitled to remain in possession for the time on account of which he is again sought to be held liable. If the title of the judgment debtor was subject to a lien or to an execution sale when he executed the lease of the property or a grant of any interest therein, his lessee or grantee cannot acquire title otherwise than subject to such lien or sale, and hence the fact that he has paid rents in advance or otherwise given a valuable consideration for his lease or grant does not, to any extent, relieve him from liability to the purchaser. The right of the latter relates to the sale when it was not supported by any lien; otherwise to the date of the inception of such lien, and cannot be destroyed or impaired by any subsequent transaction to which he did not assent.<sup>220</sup>

§ 349 a. The Purchaser's Remedy for Waste.—In California, a purchaser at an execution sale may, before his title has become absolute by the expiration of the time for redemption, maintain an action to restrain the

<sup>219</sup> *Tucker v. Byers*, 57 Ark. 215.

<sup>220</sup> *Kirkpatrick v. Boyd*, 90 Ala. 449; *Harris v. Foster*, 97 Cal. 292, 33 Am. St. Rep. 187; *Kane v. Mink*, 64 Ia. 84; *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364; *Gaynor v. Blewett*, 82 Wis. 313, 33 Am. St. Rep. 47.

commission of waste.<sup>221</sup> In New York if the defendant in execution commits waste during the time that he is entitled to redeem, the purchaser may, when he subsequently receives a deed from the sheriff, recover of the defendant for such waste. The remedy in such a case is "waste, trover, or a special action on the case."<sup>222</sup> In Michigan, purchasers of real estate under execution may maintain any action for injury to such real estate as if they were absolute owners at the time of such injury.<sup>223</sup>

It may happen after an execution sale, and before the expiration of the time allowed for redeeming therefrom, injuries are done to the premises purchased by way of cutting timber, removing fixtures, and other acts which substantially impair the value of the premises and prevent the purchaser from receiving, unimpaired, the property purchased by him. In such case, the deed, when executed, may be regarded as relating to the day of the sale, and hence as adequate to support any action brought to recover for injuries committed after that day.<sup>224</sup>

**§ 349 b. Purchaser's Right to Growing Crops.**—Growing crops are treated as personal estate for most purposes. They may be levied upon and sold as such, and the purchaser may enter upon the lands whereon they grew for the purpose of gathering and removing them,<sup>225</sup> without becoming liable to the owner of the land for the value of its use and occupation during the

<sup>221</sup> Duprey v. Moran, 4 Cal. 196; Code Civ. Proc. of Cal., § 706.

<sup>222</sup> Rich v. Baker, 3 Denio, 79.

<sup>223</sup> Marquette H. & O. R. R. v. Atkinson, 44 Mich. 166.

<sup>224</sup> Sands v. Pfeiffer, 10 Cal. 259; Stout v. Keyes, 2 Doug. 184, 43 Am. Dec. 465; Whitney v. Huntington, 34 Minn. 458, 57 Am. Rep. 68.

<sup>225</sup> Ante, §§ 113, 263; Davidson v. Waldron, 31 Ill. 120, 83 Am. Dec. 206.

time the crop is maturing and becoming fit for harvest.<sup>226</sup> And the mere sale of a growing crop operates to sever it from the realty, so that it will no longer be included in a voluntary or involuntary transfer of such realty.<sup>227</sup> But if there has been no severance, actual or constructive, a growing crop belonging to the owner of the land is deemed a part thereof, and, consequently, vests in the purchaser at execution sale.<sup>228</sup> The rule is otherwise in Ohio; because as lands must there be appraised, and must bring two-thirds of their appraised value when sold, and as the crops are not included in the appraisement, the courts of that state adjudged that they were not embraced in the sale.<sup>229</sup> In sales made under mortgage foreclosures, neither the mortgagor nor his lessees or assignees are entitled to remove crops growing on the land when the purchaser's title becomes complete, and vests him with a right of possession.<sup>230</sup> Where land is being cultivated by a cropper, who is to give the land-owner a portion of the crops for the use of the land, a sale of the landlord's share under a fieri facias against him will not operate as a constructive severance of it from the realty so as to take precedence over a subsequent sale of the realty by the sheriff to a

<sup>226</sup> *McClellan v. Krall*, 43 Kan. 216.

<sup>227</sup> *Stambaugh v. Yeates*, 2 Rawle, 161; *Meyers v. White*, 1 Rawle, 353.

<sup>228</sup> *Hershey v. Metzgar*, 90 Pa. St. 217; *Groff v. Levan*, 16 Pa. St. 179; *Thweat v. Stamps*, 67 Ala. 96; *Thomas v. Noel*, 81 Ind. 382.

<sup>229</sup> *Casilly v. Rhodes*, 12 Ohio, 88; *Albin v. Riegel*, 40 Ohio St. 339; *Houts v. Showalter*, 12 Ohio St. 124. The rule is otherwise in Indiana, though the same system of appraisement and sale prevails there. *Jones v. Thomas*, 8 Blackf. 428.

<sup>230</sup> *Aldrich v. Reynolds*, 1 Barb. Ch. 613; *Smith v. Hauge*, 25 Kan. 246; *Lane v. King*, 8 Wend. 584; *Beckman v. Sikes*, 35 Kan. 120; *Crews v. Pendleton*, 1 Leigh, 297, 19 Am. Dec. 750; *Sherman v. Willett*, 42 N. Y. 146; *Howell v. Schenck*, 4 Zab. 89; *Scriben v. Moote*, 36 Mich. 64.

**purchaser who receives a deed before the rent becomes due.**<sup>231</sup> A distinction has been drawn between growing crops and those which, though not yet severed from the soil, have fully matured before the execution of the sheriff's deed. It is claimed that the former are regarded as a part of the realty, because their condition demands the continued nourishment and support of the soil; but that the latter, being no longer dependent upon the soil for nurture, nor for anything except a mere resting-place, are not a part of the realty; and, finally, that "the ownership of the grain should be determined by its condition, and not by the act of cutting."<sup>232</sup>

The sheriff has no power to limit the effect of a sale by reserving growing crops which would otherwise vest in the purchaser.<sup>233</sup> The right of the purchaser to the emblements may also exist and be enforced against a lessee of the judgment debtor. If this were not so, the latter, by granting a lease, might substantially impair the rights of the judgment creditor. The judgment, sale, and period allowed for redemption are matters of which the tenant must take notice. If he chooses to sow a crop which, in the ordinary course of nature, he cannot gather until the purchaser acquires a right to the possession, he assumes the risk of losing such crop in the event that no redemption is made.<sup>234</sup> Timber which has fallen down, but has not been removed nor "converted into saw-logs, rails, or firewood before the date of the delivery of the sheriff's deed, passes with

<sup>231</sup> *Long v. Seavers*, 103 Pa. St. 517.

<sup>232</sup> *Hecht v. Dettman*, 56 Iowa, 679, 41 Am. Rep. 181.

<sup>233</sup> *Frost v. Render*, 65 Ga. 15.

<sup>234</sup> *Downard v. Groff*, 40 Iowa, 597; *Martin v. Knapp*, 57 Iowa, 336; *Wheeler v. Kirkendall*, 67 Iowa, 612.

the freehold.”<sup>235</sup> The same rule prevails with respect to the fragments of a building which has been blown down by a tempest. They are not thereby converted into personalty, but pass to a purchaser of the realty at a sheriff’s sale.<sup>236</sup> The right of the purchaser at an execution sale to crops may be claimed (1) when they were planted by, and belong to, the judgment debtor, and (2) when they were planted by and wholly or partly belong to a tenant of the latter, and in either event the question may arise whether the title of the purchaser may be regarded as attaching at the time when he received his conveyance or otherwise became entitled to the possession of the land, or, by operation of the doctrine of relation, at some earlier date. If grass or growing crops are severed from the soil before an execution sale is made of the realty on which they grew, they become personal property, and the title thereof does not vest in a purchaser of the realty at a subsequent sale.<sup>237</sup> As against the judgment debtor there is no doubt that the sheriff’s deed conveys title to growing crops belonging to him and standing on the land purchased,<sup>238</sup> though, perhaps, if they are fully ripened, they may be regarded as personal property, though not actually severed from the soil, and hence deemed excluded from an execution sale of such soil.<sup>239</sup> The land sold may have been leased and the crops thereon may

<sup>235</sup> *Leldy v. Proctor*, 97 Pa. St. 486; *Frank v. Magee*, 49 La. An. 1250.

<sup>236</sup> *Rogers v. Gillinger*, 30 Pa. St. 185, 72 Am. Dec. 694.

<sup>237</sup> *Relly v. Carter*, 75 Miss. 798, 65 Am. St. Rep. 621; *Yeazel v. White*, 40 Neb. 432.

<sup>238</sup> *Thweat v. Stamps*, 67 Ala. 96; *Missouri V. L. I. Co. v. Kiehl*, 25 Kan. 396; *Smith v. Hague*, 25 Kan. 246; *Scriven v. Moote*, 36 Mich. 64; *Ledyard v. Phillips*, 47 Mich. 305; *Bear v. Bitzer*, 16 Pa. St. 175, 55 Am. Dec. 470.

<sup>239</sup> *First N. B. v. Beegle*, 52 Kan. 709, 39 Am. St. Rep. 365.

have been planted and cultivated by a tenant who, by the terms of his lease, is, as between him and the landlord, entitled to the whole or some part thereof. If they were planted after the lien attached under which the sale was made, the rights of the lessee would seem on principle to be no greater than those of his lessor, and hence such crops should be held to belong to the purchaser, when their condition is such that they must have belonged to him if produced by the judgment debtor; and some of the courts have so decided.<sup>240</sup> Others have applied, in favor of the lessee, the general rule that if, when a tenant plants his crop, he cannot know at what time, if at all, the title of his landlord will cease, such tenant remains entitled to such crop, though, before its ripening or severance, the estate of the landlord has terminated.<sup>241</sup>

The next question is, conceding that the purchaser is entitled to growing crops, when does his title thereto commence? Is it at the date of the sale or of the execution of the conveyance pursuant thereto? In other words, may he be prejudiced by any transfer made subsequent to the sale or the inception of the lien under which it was made. The weight of authority favors the proposition that the law of relation operates in his favor, and that, if he is otherwise entitled to the crop, his right cannot be destroyed by any transfer made after the confirmation of the sale, nor when the crop remains on the land at the time of the sale, by any

<sup>240</sup> *Goodwin v. Smith*, 49 Kan. 351, 33 Am. St. Rep. 373; *Davis v. Newcomb*, 72 Ind. 413; *Relly v. Carter*, 75 Miss. 798, 65 Am. St. Rep. 621.

<sup>241</sup> *Monday v. O'Neil*, 44 Neb. 724, 48 Am. St. Rep. 766; *Dall v. Freeman*, 92 N. C. 351; *Bittinger v. Baker*, 29 Pa. St. 66, 70 Am. Dec. 154; *McKeeby v. Webster*, 170 Pa. St. 624.

transfer made after the lien attached to the land.<sup>242</sup> The right of a purchaser to growing crops may be enforced by an action of trespass,<sup>243</sup> trover,<sup>244</sup> or replevin;<sup>245</sup> and, when none of these remedies are adequate, may be protected by injunction.<sup>246</sup>

§ 350. The Purchaser's Right to Possession, and the Remedy for Its Enforcement.—Purchasers at execution sales, when their title becomes absolute by the expiration of the period allowed for redemption, succeed to the rights of the defendant in execution, and become entitled to the possession of the property purchased, if the defendant was so entitled. This possession, unless peaceably relinquished, must be recovered by due process of law. If the lands sold are vacant, no doubt the purchaser may take possession, if he can do so without any breach of the peace.<sup>247</sup> But he is under no circumstances justified in taking forcible possession.<sup>248</sup>

Purchasers under decrees in chancery are usually placed in possession of their property by an officer of the court, acting under a writ of assistance issued in the case in which the decree was entered. The circumstances in which this writ may properly issue, and the mode of proceeding to obtain its issuance, have already

<sup>242</sup> *Missouri V. L. Co. v. Barwick*, 50 Kan. 57; *Ruggles v. National Bank*, 43 Mich. 192; *Batterman v. Albright*, 122 N. Y. 484, 19 Am. St. Rep. 510; contra, *Dall v. Freeman*, 92 N. O. 351.

<sup>243</sup> *Lane v. King*, 8 Wend. 584; *Simers v. Saltus*, 3 Denio, 219; *Brittain v. McKay*, 1 Ired. 265, 35 Am. Dec. 738.

<sup>244</sup> *Bittinger v. Baker*, 20 Pa. St. 66, 70 Am. Dec. 154.

<sup>245</sup> *Jones v. Thomas*, 8 Blackf. 428.

<sup>246</sup> *Porche v. Bodin*, 28 La. Ann. 761.

<sup>247</sup> *McDougall v. Sitcher*, 1 Johns. 42; *Leldy v. Proctor*, 97 Pa. St. 486; *Orser v. Storms*, 9 Cow. 687, 18 Am. Dec. 543; *Bergeron v. Dartmouth S. B.*, 62 N. H. 655.

<sup>248</sup> *People v. Nelson*, 13 Johns. 340.

been considered.<sup>249</sup> The power of courts of chancery to place purchasers in possession of the property purchased is conceded,<sup>250</sup> provided it may be effectually exercised without assuming authority over persons or subject-matters not within the jurisdiction of the court. But if some person, not a party to the suit, was in adverse possession of the property when it was commenced, or has taken such possession since, without any collusion with any of the parties, as neither he nor his claim was before the court in the principal suit, the court will not assume jurisdiction over him or it, on application being made for a writ of assistance, but will leave the purchaser to pursue his remedy by some independent action.<sup>251</sup> The court may also decline to grant a writ of assistance when the judgment debtor claims in good faith to have a title not capable of assertion in the former suit, under which he has a right to remain in possession.<sup>252</sup> If, on the other hand, a party in possession has entered pendente lite under the defendant or by collusion with him, he may be dispossessed under this writ.<sup>253</sup> The issuance of the writ cannot be resisted upon grounds which ought to have been urged at some earlier stage of the proceedings, or which, if then urged, were decided against the respondent.<sup>254</sup>

In a few of the states, statutes have been enacted, under which purchasers at execution sales may obtain

<sup>249</sup> Ante, §§ 37 d and 37 e.

<sup>250</sup> *Bright v. Pennywit*, 21 Ark. 130; *Jackson v. Warren*, 32 Ill. 331; *Trabue v. Ingalls*, 6 B. Mon. 82; *Gorton v. Paine*, 18 Fla. 117; *Applegarth v. Russell*, 25 Md. 317.

<sup>251</sup> *Wright v. Rodney*, 5 Houst. 573; *Trammel v. Simmons*, 8 Ala. 271; *Wiley v. Carlisle*, 93 Ala. 237.

<sup>252</sup> *Hayward v. Kinney*, 84 Mich. 591.

<sup>253</sup> *Creighton v. Paine*, 2 Ala. 158; *Brown v. Marzyck*, 19 Fla. 840; *Paine v. Root*, 121 Ill. 77.

<sup>254</sup> *Le Conte v. Irwin*, 23 S. C. 106.



possession by proceedings instituted in the same suit in which the execution issued.<sup>255</sup> Generally, however, the purchaser must resort to an action of ejectment.<sup>256</sup> In such action he need ordinarily show only the judgment, execution, and officer's deed, and that the defendant was in possession of the property at or subsequent to the inception of the judgment lien.<sup>257</sup>

It has sometimes been held that even the production of the judgment in evidence is not indispensable when the action is against the defendant in execution;<sup>258</sup> and this view received the unequivocal support of the late Professor Greenleaf in his treatise on the law of evidence.<sup>259</sup> He claimed that when a defendant has permitted an execution to be levied upon his property, and has allowed the levy to be followed by a sale, and has taken no steps to quash the writ, "it will be presumed, in an action against him, that the judgment is right." But it is so well settled that no attention need be paid to a writ issued on a void judgment, or without any judgment, that we think the inaction of the defendant affords a ground for the presumption that he sup-

<sup>255</sup> *Seymour v. Morgan*, 45 Ga. 201; *McMechen v. Marman*, 8 Gill & J. 57; *Oakland R. Co. v. Keenan*, 56 Pa. St. 198; *Waters v. Duvall*, 6 Gill & J. 76; *Dorsey v. Campbell*, 1 Bland, 357; *Goodbar v. Daniel*, 88 Ala. 563, 16 Am. St. Rep. 76; *Merritt v. Rickey*, 127 Ind. 400.

<sup>256</sup> *Ely v. Thompson*, 3 A. K. Marsh. 69; *Morton v. Sanders*, 2 J. J. Marsh. 194, 19 Am. Dec. 128.

<sup>257</sup> *Whatley v. Newsom*, 10 Ga. 74; *Hartley v. Ferrell*, 9 Fla. 374; *Shaffer v. Bolander*, 4 G. Greene, 201; *Moran v. Patton*, 10 U. C. Q. B. 640; *McEntire v. Durham*, 7 Ired. 151, 45 Am. Dec. 512; *Green v. Watrous*, 17 Serg. & R. 393.

<sup>258</sup> *Green v. Cole*, 13 Ired. 425; *Rutherford v. Raburn*, 10 Ired. 144; *Hardin v. Cheek*, 3 Jones, 135, 64 Am. Dec. 600; *Douglass v. Bradford*, 3 U. C. O. P. 459.

<sup>259</sup> 2 Greenl. Ev., § 316, citing *Doe v. Murless*, 6 Maule & S. 110; *Hoffman v. Pitt*, 5 Esp. 22; *Cooper v. Galbraith*, 3 Wash. C. C. 546.

posed the writ to have issued without any authority, and to have no power to harm him, rather than for the presumption that the judgment existed, and was valid. At all events, it seems now to be quite well settled that a person seeking to recover property, and basing his claim upon an execution sale, must prove the judgment upon which the writ issued.<sup>260</sup>

**§ 351. What Defenses may be Asserted against the Purchaser.**—An action to recover possession of the property purchased at an execution or judicial sale may be either against the judgment debtor and his successors in interest or against a person in no way connected with the title of such judgment debtor. Where he, or one succeeding to his title or possession, is the party resisting the right of the purchaser to recover, the defenses which he may interpose are very limited. He may show that the judgment under which the sale was made was void, and hence, cannot transfer any title or right of possession to the purchaser.<sup>261</sup> A defense may

<sup>260</sup> *Peterson v. Welsbein*, 75 Cal. 178; *Leviston v. Henninger*, 77 Cal. 462; *Gillespie v. Badgett*, 2 Lea, 652; *Jackson v. Latta*, 15 Kan. 216; *Carbine v. Morris*, 92 Ill. 555; *Sharpe v. Roe*, 13 Bush, 461; *People v. Doe*, 31 Cal. 220; *Bryan v. Brown*, 2 Murph. 343; *Criswell v. Ragsdale*, 18 Tex. 444; *Den v. Despreaux*, 7 Halst. 182; *Wilson v. McVeagh*, 2 Yeates, 86; *Carlisle v. Longworth*, 5 Ohio, 368; *Dobson v. Murphy*, 1 Dev. & B. 586; *Sullivan v. Davis*, 4 Cal. 291; *Doe v. Smith*, 2 Stark. 199, note; 1 *Holt's Cases*, 589, note; *Lanning v. London*, 4 Wash. C. C. 513; *Fenwick v. Floyd*, 1 Har. & G. 172; *Hihn v. Peck*, 30 Cal. 287; *Atchinson v. Rosalip*, 4 Chand. 12; *Etheridge v. Edwards*, 1 Swan, 426; *Fischer v. Eastman*, 68 Ill. 78; 6 *Chic. L. N.* 52. See *Davis v. Baker*, 67 N. C. 388, for an instance where the production of the original judgment was not required, because it had been confirmed and made a judgment of a higher court.

<sup>261</sup> *Rimes v. Williams*, 99 Ga. 281; *Wooters v. Joseph* (Ill.), 27 N. E. 80; *James v. Mayor*, 41 La. Ann. 1100; *Barber v. Morris*, 37 Minn. 194, 5 Am. St. Rep. 836; *Howell v. Gilt-Edge M. Co.*, 32 Neb. 627; *Miller v. Plue*, 45 Neb. 701; *Hoppock v. Cray* (N. J. Ch.), 21 Atl. 624; *McCauley v. Williams*, 122 N. C. 293; *Crenshaw v. Julian*, 26 S. C. 483, 4 Am. St. Rep. 719.

also be successfully made on the ground that the execution or any essential proceeding taken thereunder was void,<sup>262</sup> but we shall not here undertake to consider what executions or proceedings are void to the extent of leaving a purchaser without title, for these matters have been, to a great extent, the subjects of preceding chapters of this work. The judgment or execution may not have been void, but after the sale one or both may have been set aside by the court. If so, its action is usually restricted in its consequences to purchasers with notice of the irregularities inducing the action of the court.<sup>263</sup>

A judgment debtor or his successor in interest may avoid the recovery of possession by the purchaser by proving that, though the defendant had an estate or interest in the property, it was not subject to, or was exempt from, execution.<sup>264</sup> A familiar instance of this is the holding of possession under an equitable title,<sup>265</sup> or as a mere tenant at will or by sufferance,<sup>266</sup> where such titles are not subject to execution, or that the judgment debtor held the naked legal title without having any beneficial interest therein.<sup>267</sup> So the defendant may show that the property was a homestead, and, on that account, not the subject of an involuntary

<sup>262</sup> *Prentiss v. Bowden*, 145 N. Y. 342.

<sup>263</sup> *Gowen v. Conlow*, 51 Minn. 213; *Chamblee v. Broughton*, 120 N. C. 170; *Martin v. Minnehatika S. B.*, 7 S. D. 263; *Huckins v. Kapf* (Tex. App.), 14 S. W. 1016; *Halliday v. Stuart*, 151 U. S. 229.

<sup>264</sup> *Harris v. Murray*, 28 N. Y. 574, 86 Am. Dec. 268; *Cook v. Webb*, 18 Ala. 810; *Dickinson v. Smith*, 25 Barb. 102; *Badlam v. Cox*, 11 Ired. 456.

<sup>265</sup> *Elmore v. Harris*, 13 Ala. 360; *Davis v. McKinney*, 5 Ala. 729; *Badlam v. Cox*, 11 Ired. 456; *Dworak v. More*, 25 Neb. 735; *Bates v. Lingerwood M. Co.*, 130 N. Y. 200.

<sup>266</sup> *Dickinson v. Smith*, 25 Barb. 102; *Colvin v. Baker*, 2 Barb. 206; *Clements v. Pearce*, 63 Ala. 284.

<sup>267</sup> *Stone v. Perkins*, 85 Fed. Rep. 616.

transfer,<sup>268</sup> unless the sale is a judicial one, and the husband and wife were both parties to the decree directing the sale.<sup>269</sup> The sale of exempt personal property under execution, where the right of exemption has not been expressly or impliedly waived, is also void, and the purchaser, therefore, may always be met with this defense, where the facts are sufficient to support it.<sup>270</sup>

If the defendant in execution was in possession of the personal property sold, he must surrender such possession to the purchaser, and cannot avoid his obligation to do so by showing that his title was invalid, and that a third person is the true owner and entitled to the possession.<sup>271</sup>

All persons who come into possession under the defendant in execution, after the lien of the judgment or of the levy has attached, hold rights subordinate to the lien, and can assert no defenses against the purchaser which would not be equally available to the defendant in execution.<sup>272</sup> If the defendant in execution contin-

<sup>268</sup> *Williams v. Young*, 17 Cal. 403; *Hughes v. Watt*, 26 Ark. 228; *Pardee v. Lindley*, 31 Ill. 174, 83 Am. Dec. 219; *Brokaw v. Ogle*, 170 Ill. 115; *Gunn v. Wynne* (Tex. Civ. App.), 43 S. W. 290.

<sup>269</sup> *Haynes v. Meet*, 14 Iowa, 320; *Trader's N. B. v. Schorr*, 20 Wash. 1.

<sup>270</sup> *Phillips v. Taber*, 83 Ga. 565.

<sup>271</sup> *Normant v. Eureka Co.*, 98 Ala. 181, 39 Am. St. Rep. 45; *Robinson v. Thornton*, 102 Cal. 681; *Crenshaw v. Julian*, 26 S. C. 283, 4 Am. St. Rep. 719; *Boyd v. Jones*, 49 Mo. 202; *Jackson v. Scott*, 18 Johns. 94; *Matney v. Graham*, 59 Mo. 190; *Wade v. Saunders*, 70 N. C. 277; *Jackson v. Graham*, 3 Caines, 188; *Stuckey v. Crosswell*, 12 Rich. 273; *Halley v. Curry*, 3 Strob. 99; *Dunlap v. Cook*, 18 Pa. St. 454; *Gould v. Hendrickson*, 96 Ill. 599; *Turner v. First Nat. Bank*, 78 Ind. 19; *McDonald v. Badger*, 23 Cal. 393, 83 Am. Dec. 123; *Ferguson v. Miles*, 3 Gilm. 358, 44 Am. Dec. 702; *Hayes v. Bernard*, 38 Ill. 297.

<sup>272</sup> *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 49 Am. Dec. 189; *Carson v. Smart*, 12 Ired. 369; *Young v. Algeo*, 3 Watts, 223; *Eisenhart v. Slaymaker*, 14 Serg. & R. 153.

ues in possession of the property, he is regarded as a tenant at will<sup>273</sup> of the purchaser, and not as an adverse holder;<sup>274</sup> nor can he claim against the purchaser the title or rights of an adverse holder until after he has given notice to the purchaser that he has assumed an attitude of hostility.<sup>275</sup>

We have already stated that a defendant in execution and his successor in interest may resist an action by the purchaser to recover possession of the property where it is not subject to execution. Its exemption from this writ may sometimes exist without being declared in express terms by statute, as where public policy or some statute forbids the transfer of the title to another. Thus, one may be in possession of public lands of the United States intending to acquire title thereto under the pre-emption or homestead laws, which, in turn, may forbid any transfer of such title prior to full compliance with such laws. If so, an execution sale cannot transfer title to the purchaser, and the defendant may retain possession upon showing that, at the date of the sale, he was a mere occupant of the public lands of the United States, and that since the sale he has acquired a homestead or other right under the United States.<sup>276</sup> To maintain the general rule in such circumstances would impair the power of the general government over the public domain, and conflict with the homestead and pre-emption laws.

<sup>273</sup> *Colvin v. Baker*, 2 Barb. 206.

<sup>274</sup> *Jackson v. Sternbergh*, 1 Johns. Cas. 153; *Jackson v. Scott*, 18 Johns. 94; *Hardy v. Simpson*, Busb. 325; *Webb v. Thompson*, 23 Ind. 428.

<sup>275</sup> *Swift v. Agnes*, 38 Wis. 228.

<sup>276</sup> *Emerson v. Sansome*, 41 Cal. 552; *Montgomery v. Whiting*, 40 Cal. 294; *Rupert v. Jones*, 119 Cal. 111.

**§ 351 a. Purchaser's Rights Arising from Ratification of the Sale by the Parties in Interest.**—As a general rule, a confirmation or ratification cannot strengthen a void estate. “For confirmation may make a voidable or defeasible estate good, but cannot operate on an estate void in law.”<sup>277</sup> If this rule be one of universal application, then there can be no necessity for considering the question of ratification in connection with void judicial sales. But this is one of those rules which are so limited by exceptions that the circumstances to which it may be applied are scarcely more numerous than those from which its application must be withheld. There can now be scarcely any doubt that void judicial sales are within the exceptions, and are unaffected by the rule.<sup>278</sup> These sales may be ratified either directly or by a course of conduct which estops the party from denying their validity. Thus, if the defendant in execution, after a void sale of his property has been made, claims and receives the surplus proceeds of the sale, with a full knowledge of his rights, his act must thereafter be treated as an irrevocable confirmation of the sale.<sup>279</sup>

In a case decided in Pennsylvania a judgment was recovered against the administrator of an estate. The

<sup>277</sup> Bouvler's Law Dic., tit. Confirmation.

<sup>278</sup> *Maple v. Kussart*, 53 Pa. St. 348, 91 Am. Dec. 214; *Johnson v. Fritz*, 44 Pa. St. 449; *Deford v. Mercer*, 24 Iowa. 118, 92 Am. Dec. 460; *Pursley v. Hayes*, 17 Iowa, 310; *Johnson v. Cooper*, 56 Miss. 608.

<sup>279</sup> *Stroble v. Smith*, 8 Watts, 280; *Headen v. Oubre*, 2 La. Ann. 142; *Coleman v. Dewees*, 3 La. Ann. 698; *Huffman v. Gaines*, 47 Ark. 227; *Sittig v. Morgan*, 5 La. Ann. 574; *McLeod v. Johnson*, 28 Miss. 374; *Southard v. Perry*, 21 Iowa, 488, 89 Am. Dec. 587; *State v. Stanley*, 14 Ind. 409; *Crowell v. Meconkey*, 5 Pa. St. 168; *Woodstock I. Co. v. Fullenwider*, 87 Ala. 584, 13 Am. St. Rep. 73; *Fallon v. Worthington*, 13 Colo. 559, 16 Am. St. Rep. 231; *Hazel v. Lyden*, 51 Kan. 233, 37 Am. St. Rep. 273; *Brewer v. Nash*, 16 R. I. 458, 27 Am. St. Rep. 749.

heirs of the decedent were not parties to the action in which this judgment was recovered, and were, therefore, under the laws of that state, unaffected by it. Under this judgment writs were issued, and lands of the decedent levied upon, condemned, and sold. They produced funds more than sufficient to satisfy the judgment. The surplus was paid to the heirs. One of the daughters having brought ejectment for the lands, the supreme court, in discussing and determining her rights, said: "She was perfectly acquainted with the fact that she had not been served with process to make her a party to the judgment on which the sale was made, and that she had not voluntarily made herself a party to that proceeding without process; and there is no evidence to repel the presumption that she was equally well acquainted with the rules of law which entitled her to disregard a sale made under such a judgment as having no operation whatever upon her rights, unless she did some act which, on principles of equity and common honesty, might estop her from impeaching it. As she was not a defendant in the execution, she had no right, in that character, to receive any part of the money after payment of the creditor's claim. Her only title to the money depended upon the effect of the proceedings in divesting her estate in the land and converting it into money by passing her title to the purchasers. Upon this ground alone could she make any claim to the money, in law or equity. The receipt of her share of the money was therefore an affirmation that her title had passed to the purchasers by virtue of the sheriff's sale, and she cannot be received to make a contrary allegation now, to the injury of those who paid their money on the faith of the conveyance. Where a sale is made of land, no one can be

permitted to receive both the money and the land. Even if the vendor possessed no title whatever at the time of the sale, the estoppel would operate upon a title subsequently acquired. It was held by this court, at a late sitting in Harrisburg, that 'equitable estoppels of this character apply to infants as well as to adults, to insolvent trustees and guardians as well as persons acting for themselves, and have place as well where the proceeds arise from a sale by authority of law as where they spring from the act of the party.'<sup>280</sup> The application of this principle does not depend upon any supposed distinction between a void and voidable sale. The receipt of the money, with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience, and therefore binds the right of the party in one case as well as the other."<sup>281</sup> Perhaps it is not essential that the defendant in execution should have directly received any part of the proceeds of the sale. If he knows of the sale, makes no objection thereto, and permits the proceeds to be applied to the payment of his debts, he will, at least in Pennsylvania, be precluded from denying its validity.<sup>282</sup> This rule has been applied in Georgia against a defendant who, being

<sup>280</sup> *Commonwealth v. Shuman's Adm'r*, 6 Harris, 346; *McPherson v. Cunliffe*, 11 Serg. & R. 426, 14 Am. Dec. 642; *Wilson v. Bigger*, 7 Watts & S. 111; *Stroble v. Smith*, 8 Watts, 280; *Benedict v. Montgomery*, 7 Watts & S. 238, 42 Am. Dec. 230; *Martin v. Ives*, 17 Serg. & R. 364; *Crowell v. Meconkey*, 5 Barr, 168; *Hamilton v. Hamilton*, 4 Barr, 193; *Dean v. Connelly*, 6 Barr, 239; *Robinson v. Justice*, 2 Penr. & W. 19, 21 Am. Dec. 407; *Share v. Anderson*, 7 Serg. & R. 48, 10 Am. Dec. 421; *Furness v. Ewing*, 2 Barr, 479; *Adlum v. Yard*, 1 Rawle, 163, 18 Am. Dec. 608.

<sup>281</sup> *Smith v. Warden*, 19 Pa. St. 429.

<sup>282</sup> *Spragg v. Shriver*, 25 Pa. St. 282, 64 Am. Dec. 698; *Mitchell v. Freedley*, 10 Pa. St. 208; *Maple v. Kussart*, 53 Pa. St. 352, 91 Am. Dec. 214; *Williard v. Williard*, 56 Pa. St. 128.



present at a sale, was one of the bidders and made no objection or suggestion founded upon a claim of irregularity on account of which he subsequently insisted the sale was void.<sup>283</sup> We think, however, the better opinion is that mere silence or acquiescence on the part of the defendant in execution, not attended with any affirmative act on his part, does not ratify a void sale, nor estop him from urging its invalidity.<sup>284</sup> If lands are sold at a partition or other chancery sale, no cotenant who has claimed and received his share of the proceeds can deny the validity of the partition. He cannot be allowed to retain the money and regain the land.<sup>285</sup>

**§ 352. The Purchaser's Remedy for Failure of Title.—** A purchaser at an execution or judicial sale may obtain nothing by his purchase. This is the case—1. When the proceedings are so defective that they cannot divest the defendant of his title; and 2. When the defendant had no title to divest, or at least had no title which was capable of being divested by the sale. In either case, the purchaser parts with a valuable consideration, for which he acquires nothing. The question then arising is: Has the purchaser any remedy? and if so, what is the remedy? and to what cases may it be applied with success? When the plaintiff is the purchaser, we have already shown that he may, in most states, upon failure of his title, in effect vacate the apparent satisfaction produced by the sale, and obtain a new execution.<sup>286</sup> If the title fails through de-

<sup>283</sup> *Mock v. Stuckey*, 96 Ga. 187.

<sup>284</sup> *Moody's Heirs v. Moeller*, 72 Tex. 635, 13 Am. St. Rep. 839.

<sup>285</sup> *Tooley v. Gridley*, 3 Smedes & M. 493, 41 Am. Dec. 628; *Merritt v. Horne*, 5 Ohio St. 307, 67 Am. Dec. 298.

<sup>286</sup> § 54; *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *Piper v.*

fects in the proceedings arising from the neglect or misconduct of the sheriff, the purchaser can sustain an action on the case against that officer.<sup>287</sup> Where a purchase is made under a decree in equity, and such decree is reversed for a jurisdictional defect in the proceedings, or where the title fails because the grantee of a mortgagor was not a party to a foreclosure, the plaintiff has the right to prosecute further proceedings. In the case first named, he may have the process properly served, and thus give the court jurisdiction to proceed. In the second-named case, he may apply to the court, have the sale vacated, the satisfaction canceled, and then, by supplemental bill, bring in the proper parties and have the property resold. In either case, the purchaser may, by applying to the court in the original suit, have the proceedings conducted for his benefit, though in the name of the original plaintiff.<sup>288</sup> The time within which this application must be made is not clearly settled. That it is unlimited none will insist. It must be within what the court regards as a reasonable time. "The rule requires that he shall inform himself of the law and facts within a reasonable time after his purchase, in order to avail himself of the privilege accorded to him by a court of equity, to secure in the same suit a return of his money."<sup>289</sup> If in favor of parties attempted to be brought before the court by the new proceeding the statute of limitations has interposed, so as to constitute a defense to an in-

Elwood, 4 Denio, 165; *Adams v. Smith*, 5 Cow. 280; *Watson v. Relsig*, 24 Ill. 281, 76 Am. Dec. 746.

<sup>287</sup> *Sexton v. Nevers*, 20 Pick. 451, 32 Am. Dec. 225.

<sup>288</sup> *Boggs v. Hargrave*, 16 Cal. 559; *Burton v. Lies*, 21 Cal. 87; *Johnson v. Robertson*, 34 Md. 165; *Cook v. Toumbs*, 36 Miss. 685; *Hudgin v. Hudgin*, 6 Gratt. 320, 52 Am. Dec. 124. See, also, *Scott v. Dunn*, 1 Dev. & B. Eq. 425, 30 Am. Dec. 174.

<sup>289</sup> *Barnard v. Wilson*, 66 Cal. 251.

dependent suit, no relief can be obtained against them.<sup>290</sup> The relief involved includes the vacating of the pre-existing judgment and sale, and, hence, the right to pursue the remedy by motion may be cut off by general statutory provisions limiting the time within which, upon motion, relief may be granted from a judgment or decree, in which event, relief must be sought by an independent suit in equity.<sup>291</sup> In New York and Tennessee, if the proceedings are utterly void, the purchaser may recover from the plaintiff the amount paid upon the latter's judgment.<sup>292</sup> In Iowa, if the judgment on which the execution issued was not a lien at the time of the levy, and this fact was unknown to the purchaser, the court must set aside the sale on his motion, and a new execution may be issued, but the sheriff or judgment creditor must pay over to the purchaser the purchase money paid by him. Hence, if the property sold was a homestead, and this fact was unknown to the purchaser, he is entitled to a return of the purchase money.<sup>293</sup>

In Texas, if a sale under a valid judgment is void for defects in the proceedings, the purchaser is entitled to the property, unless the defendant will reimburse him for the amount he has paid toward satisfying the judg-

<sup>290</sup> *Jeffers v. Cook*, 58 Cal. 147.

<sup>291</sup> *Brackett v. Banegas*, 99 Cal. 623; *Brackett v. Banegas*, 116 Cal. 278, 58 Am. St. Rep. 626.

<sup>292</sup> *Chapman v. Brooklyn*, 40 N. Y. 372; *Schwinger v. Hickok*, 53 N. Y. 280; *Henderson v. Overton*, 2 Yerg. 394, 24 Am. Dec. 492. The principle upon which these cases profess to proceed is, that a party may recover moneys paid where there is a total failure of consideration. This principle is sufficiently supported by the authorities (*Moses v. McFarlane*, 2 Burr. 1009; *Rheel v. Hicks*, 25 N. Y. 289; *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516); but we doubt its applicability to execution sales.

<sup>293</sup> *Jones v. Blumenstein*, 77 Ia. 631; Code Ia., § 3090.

ment.<sup>294</sup> In Kentucky, Missouri, Indiana, Illinois, and Texas, if the defendant in execution has no title, he may be compelled, by proceedings in equity, to reimburse the purchaser for the amount contributed, by means of the purchase, to the satisfaction of the judgment.<sup>295</sup> But we think the better rule is, that, unless proceeding upon the ground of fraud or misrepresentation, or some other well-known ground, a purchaser at an execution sale cannot by any independent action recover of either of the parties the amount of his bid.<sup>296</sup> Such an action is necessarily founded upon a mistake of law. The purchaser is sure to base his claim upon the fact that he mistook the legal effect of the proceedings in the case, or of the defendant's muniments of title. And it is well known that a mistake of law is ordinarily not a sufficient foundation for relief at law nor in equity. In a few of the states, purchasers have been given a statutory remedy.<sup>297</sup>

<sup>294</sup> *Johnson v. Caldwell*, 38 Tex. 218; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769. A person seeking to cancel a sheriff's deed as a cloud upon his title must, in Texas, first repay the amount for which the property was sold by the sheriff. *Herndon v. Rice*, 21 Tex. 457; *Morton v. Welborn*, 21 Tex. 773; *Brown v. Lane*, 19 Tex. 205.

<sup>295</sup> *McGhee v. Ellis*, 4 Litt. 245, 14 Am. Dec. 124; *Muir v. Craig*, 3 Blackf. 293, 25 Am. Dec. 111; *Warner v. Helm*, 1 Gilm. 220; *Price v. Boyd*, 1 Dana, 436; *Hawkins v. Miller*, 26 Ind. 173; *Preston v. Harrison*, 9 Ind. 1; *Jones v. Henry*, 3 Litt. 435; *Dunn v. Frazier*, 8 Blackf. 432; *Pennington v. Clifton*, 10 Ind. 172; *Richmond v. Marston*, 15 Ind. 134; *Julian v. Bell*, 26 Ind. 220, 89 Am. Dec. 460; *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *Wilchinsky v. Cavender*, 72 Mo. 192; *Burns v. Ledbetter*, 56 Tex. 282.

<sup>296</sup> *Branham v. San Jose*, 24 Cal. 585; *Boggs v. Hargrave*, 16 Cal. 559; *Salmond v. Price*, 13 Ohio, 368, 42 Am. Dec. 204; *Laws v. Thompson*, 4 Jones, 104; *Halcombe v. Loudermilk*, 3 Jones, 491; *The Monte Allegre*, 9 Wheat. 616; *Lewark v. Carter*, 117 Ind. 206, 10 Am. St. Rep. 40.

<sup>297</sup> Code Civ. Proc. of Cal., § 708; *Halcombe v. Loudermilk*, 3 Jones, 491; *Chambers v. Cochran*, 18 Iowa, 160.

The payment of money in pursuance of an execution or judicial sale usually results in the discharge of some lien upon the property sold, or some claim for the satisfaction of which the holder had the right to compel the sale of such property. In the event that the sale is void, it must happen either that the owners of the property may retain this benefit without making any return therefor, or else the purchaser must be permitted to enforce for his benefit the liens which his purchase has discharged. There are decisions denying to the purchaser the right to revive and enforce such lien, on the ground that he is a mere volunteer, and therefore not entitled to subrogation;<sup>298</sup> and we think they are correct in affirming that his case does not fall within the reasons upon which subrogation has ordinarily been compelled. This, instead of being a sufficient cause for denying his claim, is rather a proper occasion for reconsidering the grounds on which subrogation may be maintained and bringing within them the persuasive equities of persons who, though acting without compulsion, have, in good faith, relying on their confidence in assumed judicial proceedings, unwittingly discharged a lien when they believed themselves to be acquiring a title. There is, at the present time, a large and ever-increasing majority of the adjudged cases which sustains the right of the purchaser at an execution or judicial sale, by appropriate proceedings, to be subrogated to the lien he has discharged. Whether the decisions can be satisfactorily justified on the principles of subrogation or not, their manifest equity commends

<sup>298</sup> *Richmond v. Marston*, 15 Ind. 136; *Nowler v. Colt*, 1 Ohio, 518, 13 Am. Dec. 640; *Kinney v. Knoebel*, 51 Ill. 112; *Bishop v. O'Connor*, 69 Ill. 431; *Chambers v. Jones*, 72 Ill. 279.

them to our regard and receives our unqualified approval.<sup>299</sup>

§ 352 a. **Right of Purchaser to Hold Land until Repaid the Purchase Price.**—In some of those states in which it is the right of the purchaser to be subrogated to the lien which his purchase and consequent payment have removed, his possession will not be disturbed until his claims have been satisfied. Thus in Louisiana, the court, professedly proceeding under the rules of the civil law, said: "It has been proved that the proceeds arising from the sale of the slaves were applied to the discharge of the judgment debts of the plaintiff, and the court is of opinion that he cannot recover in this suit until he repay that money. This is the doctrine expressly laid down in Febrero, lib. 3, cap. 2, sec. 5, n. 537; and we readily adopt it; for nothing could be more unjust than to permit a debtor to recover back his property because the sale was irregular, and yet allow

<sup>299</sup> Meher v. Cole, 50 Ark. 361, 7 Am. St. Rep. 101; Bond v. Montgomery, 56 Ark. 563, 35 Am. St. Rep. 119; Wright v. Bruschke, 62 Ill. App. 358; Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125; Paxton v. Sterne, 127 Ind. 289; Milburn v. Phillips, 143 Ind. 93, 52 Am. St. Rep. 403; Cosgrove v. Merz (R. I.), 37 Atl. 704; Givens v. Carroll, 40 S. C. 413, 42 Am. St. Rep. 889; Bailey v. Bailey, 41 S. C. 337, 44 Am. St. Rep. 713; Short v. Sears, 93 Ind. 505; Duncan v. Gainey, 108 Ind. 579; Poole v. Ellis, 64 Miss. 555; Stults v. Brown, 112 Ind. 370; Caldwell v. Palmer, 6 Lea, 652; Bennett v. Coldwell, 8 Baxt. 483; McLaughlin v. Daniel, 8 Dana, 183; Bentley v. Long, 1 Strob. Eq. 52, 47 Am. Dec. 523; Brobst v. Brock, 10 Wall. 519; Scott v. Dunn, 1 Dev. & B. Eq. 425, 30 Am. Dec. 174, and note; Valle v. Fleming's Heirs, 29 Mo. 152, 77 Am. Dec. 557; Freeman on Void Judicial Sales, §§ 52, 53; Bright v. Boyd, 1 Story, 478; Hudgin v. Hudgin, 6 Gratt. 320, 52 Am. Dec. 124; Blodgett v. Hitt, 29 Wis. 182; Charleston L. & M. Co. v. Brockmeyer, 23 W. Va. 635; Ray v. Detchen, 79 Ind. 56; Jones v. Smith, 55 Tex. 383; Perry v. Adams, 98 N. C. 167, 2 Am. St. Rep. 326, note. If the purchaser has been guilty of fraud, his right to subrogation will be denied. Elam v. Donald, 58 Tex. 316.

him to profit by that irregular sale to discharge his debts.”<sup>300</sup> The principles thus adopted in Louisiana have been approved and applied in Texas,<sup>301</sup> while in several other states they have been held either to estop the plaintiff from recovering, or to warrant the interposition of a court of equity to prevent his prosecuting an action at law until the purchaser has been reimbursed the amount which, by means of the sale, he has contributed to discharge a lien on the property sold.<sup>302</sup>

Statutes have been enacted in effect undertaking to deny to persons whose property has been sold under execution any right to recover it from the purchaser or his successor in interest, except upon condition that the money paid be refunded, but they have been pronounced unconstitutional. Thus, an amendment to the Code of Civil Procedure of New York declared that if the title of the grantee at an execution sale “or his assignees, is adjudged, for any reason or cause whatsoever, to be null and void in any action for that purpose brought by the judgment debtor or his assignees, such judgment shall have no force or effect; unless within twenty days after the entry of such judgment the plaintiff shall pay to such grantee, or his assignees, the sum of money which was paid upon the sale, with interest from the time of the sale, including the costs and expenses of defendant in defending the action in which such judgment was recovered, to be adjusted by

<sup>300</sup> *Dufour v. Camfranc*, 11 Mart. 615, 18 Am. Dec. 360; *Davis v. Gaines*, 104 U. S. 386.

<sup>301</sup> *Howard v. North*, 5 Tex. 290, 51 Am. Dec. 769; *French v. Grenet*, 57 Tex. 273; *Donnebaum v. Tinsley*, 54 Tex. 362; *Northcraft v. Oliver*, 74 Tex. 162.

<sup>302</sup> *McGee v. Wallis*, 57 Miss. 638, 34 Am. Rep. 484; *Robertson v. Bradford*, 73 Ala. 116; *Schafer v. Causey*, 76 Mo. 365; *Cathcart v. Sugenhelmer*, 18 S. C. 123; *Meher v. Cole*, 50 Ark. 361, 7 Am. St. Rep. 101.

a judge of the court in which such action was brought; and, in the event of plaintiff's failure to pay such purchase money and expenses within the time aforesaid, said title shall be valid in said grantee." The court of appeals, in considering this statute, referred to other provisions of the code conferring remedies on purchasers at execution sales on failure of title because of irregularities in the judgment or sale, and concluded that they were "apparently sufficient for all the requirements of justice, independent of the amended section," and that the amendment was, therefore, clearly invalid, because it undertook to deny to the owner of property access to the constitutional courts of the state for relief, and, without due process of law, took his property from him and bestowed it upon another.<sup>303</sup>

<sup>303</sup> *Gilman v. Tucker*, 128 N. Y. 190, 26 Am. St. Rep. 464. Among the reasons stated by the court in its opinion were the following: "The act makes no distinction between cases where the judgment itself upon which the sale was made has been reversed and set aside, and those in which the process alone has been adjudged to be void. It wholly ignores any such distinction, and requires the payment to be made as well where no claim ever existed as where a legal claim has been illegally attempted to be enforced. It furnishes no argument in favor of the legality of this act to say that some of the consequences following its enactment could, under special conditions, have been constitutionally produced, if provided for in some other way. The broad question here is, whether this enactment, construed according to its plain meaning and intent, enables one person to acquire the property of another against his will, except by due process of law. If it does, the courts must condemn it as violative of the fundamental law. The vicious purpose of the act is so thoroughly interwoven with the whole scheme of the enactment as to render it impossible to eradicate its objectionable features without reconstructing the entire section. It is not, therefore, a case where any part of the act can be supported. We also think the act violates the constitutional guaranty, because it assumes to nullify a final and unimpeachable judgment, not only establishing the plaintiff's right to the premises in dispute, but also awarding him a sum of money as costs. After rendition, this judgment became an evidence of title, and could not be taken from the



plaintiff without destroying one of the instrumentalities by which her title was manifested. A statute which assumes to destroy or nullify a party's muniments of title is just as effective in depriving him of his property as one which bestows it directly upon another. *Matter of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, and authorities there cited. In the one case it despoils the owner directly, and in the other renders him defenseless against any assault upon his property. Authority which permits a party to be deprived of his property by indirection is as much within the meaning and spirit of the constitutional provision as when it attempts to do the same thing directly. Even assuming that it might be lawful for the legislature to impose a condition upon the right of a party to maintain a particular action to recover real property, no such case is here provided for. This statute makes any action at law to establish his right subject to its provisions, and thus deprives him of all remedy for the wrong done him. It not only does this, but it attempts to reverse a judgment and give to the defeated party the fruits of a recovery awarded to another. We must bear in mind that a judgment has here been rendered, and the rights flowing from it have passed beyond the legislative power, either directly or indirectly, to reach or destroy. After adjudication, the fruits of the judgment become rights of property. These rights became vested by the action of the court and were thereby placed beyond the reach of legislative power to affect. We have been referred to no authority which justifies legislation taking such rights away arbitrarily, and we know of no theory upon which it can be sustained. Instances where land, subject to a lien for taxes, has been sold therefor, and the owner has been required to pay the taxes as a condition of maintaining an action to recover the land, or the borrower of money, at usurious rates, is required to repay the sum equitably due before maintaining a suit in equity to enforce a forfeiture of the securities held by the creditor, are obviously not analogous to the case under consideration. We are therefore of the opinion that the repugnancy between the law and the constitutional rights of the citizen is so irreconcilable that the law must fail."

## CHAPTER XXVI.

## OF RETURNING EXECUTIONS.

- § 353. When the return may be made.
- § 354. By whom the return must be made.
- § 355. Form of the return.
- § 356. Return of nulla bona—form of, and when proper.
- § 357. Return of fieri feci.
- § 358. Amending returns.
- § 359. Time within which amendments may be made.
- § 360. Of the scope and effect of amendments, and the persons protected therefrom.
- § 361. Quashing returns.
- § 362. Construing returns.
- § 363. Returns, when admissible as evidence.
- § 364. Returns, effect as evidence between the parties.
- § 365. Returns, effect as evidence against strangers to the suit.
- § 366. Returns, effect as evidence for or against the officer.
- § 367. Returns, how compelled.
- § 368. Liability of officer for not returning writs.
- § 369. Liability of officer for false returns.

§ 353. When the Return may be Made.—The officer to whom a writ is delivered for service must return it to the court whence it issued,<sup>1</sup> with an indorsement containing a brief history of the steps taken by him toward its execution. "The return of an execution is not merely the bringing back into court the paper on which the authority of the sheriff is written, but it is necessary that he should make on that paper an indorsement in writing of what he has done in obedience to the order therein contained."<sup>2</sup>

<sup>1</sup> Wright v. Marvin, 59 Vt. 487. But if a justice of the peace to whom an execution should be returned removes from the county before the return day, a return is properly made to the town clerk, in New York. Hampton v. Boylan. 46 Hun, 151.

<sup>2</sup> State v. Melton, 8 Mo. 419; Nelson v. Brown, 23 Mo. 18.

The time within which the return should be made varies in the different states. It is usually stated in the writ, but where the law fixes a specific time, the officer must follow the law, and no designation of the return day need be placed in the writ. Statutes fixing the time within which execution shall be returned are mandatory. Such writs, therefore, after the date thus fixed, become inoperative for the purpose of any further seizure of property thereunder, and, in Nebraska, the further consequence seems to follow that the officer can take no further action, and any levy by him made is released.<sup>3</sup> This consequence is the result of the construction given by the court to the statutes of that state. Elsewhere, the arrival of the time when the writ must be returned does not prevent the taking of such proceedings thereunder as may be necessary to dispose of property previously levied upon. If the statute provides that execution shall be returnable on or before the first day of the next term after issuing, the indorsement thereon by the clerk of the court, attested by his signature that the writ is "returnable in sixty days," cannot modify the statute or extend the return day as thus fixed by law.<sup>4</sup>

If the writ is to be returned in a certain number of days from its issue, or from the entry of the judgment, the day of the issue or entry must be excluded in computing the time for the return.<sup>5</sup> The writ must be returned, whether it has been executed or not.<sup>6</sup> If it is void, it is, in legal effect, no writ, and the officer cannot be held responsible for failing to return it.<sup>7</sup>

<sup>3</sup> Buckley v. Mason, 52 Neb. 639.

<sup>4</sup> Cain v. Underwood, 74 Tex. 549.

<sup>5</sup> Allen v. Carty, 19 Vt. 65; Muzzy v. Howard, 42 Vt. 23.

<sup>6</sup> Brown v. Baker, 9 Port. 503.

<sup>7</sup> Holloway v. Johnson, 7 Ala. 660.

The duty of the officer is to return the writ at its return day.<sup>8</sup> This duty he can rarely neglect without rendering himself liable to the plaintiff.<sup>9</sup> It may also indirectly make him liable to the defendant when he has acted under attachment or other mesne process, for, under such process, if the time for the return thereof has expired, the officer cannot justify under the writ, unless he has actually made his return.<sup>10</sup> This consequence appears not to follow the failure to return a writ of execution. An officer in default in this respect may, nevertheless, justify under his writ.<sup>11</sup>

The return may be made during any portion of the business hours of the return day. The officer need not have it made and filed in the morning of that day;<sup>12</sup> but, if he does so, he is not liable to the plaintiff because an opportunity for making the money happened to occur later in the day.<sup>13</sup> If the return day falls on Sunday, the officer may keep the writ until Monday.<sup>14</sup> This must necessarily be so under the rule, recognized in the majority of the states, that, when the time for the doing of an act falls on Sunday or a legal holiday,

<sup>8</sup> *Bank v. Torre*, 2 Speers, 501; *Wallis v. Bourg*, 16 La. Ann. 176; *Hyatte v. Allison*, 3 Jones, 533; *State v. Records*, 3 Harr. (Del.) 146. The officer cannot be compelled to make a return before the return day. *Spencer v. Cuyler*, 17 How. Pr. 157.

<sup>9</sup> *Morrow v. Allison*, 11 Ired. 217; *Bershears v. Warner*, 5 Sneed, 676; *Clingman v. Barrett*, 6 Humph. 20.

<sup>10</sup> *McAden v. Gibson*, 5 Ala. 341; *Williams v. Babbitt*, 14 Gray, 141; *Russ v. Butterfield*, 6 Cush. 243; *Brown v. Bessitt*, 21 N. J. L. 46.

<sup>11</sup> *Cheasley v. Barnes*, 9 East, 73; *Rowland v. Veale*, Cowp. 18; *McAden v. Gibson*, 5 Ala. 341.

<sup>12</sup> *Bull v. Clarke*, 2 Met. 587; *Homan v. Liswell*, 6 Cow. 659; *Rex v. Sheriff of Berks*, 5 East, 386.

<sup>13</sup> *Hinman v. Borden*, 10 Wend. 367.

<sup>14</sup> *Williams v. State*, 5 Ind. 235; *Ostertag v. Galbraith*, 23 Neb. 730.

it may be done on the next succeeding business day.<sup>15</sup> In Arkansas, however, where a statute required the return of an execution on or before the return day therein specified, and a writ was issued by its terms returnable "within sixty days" from its date, and the sixtieth day fell upon Sunday, it was held that the officer could not postpone his act until the following Monday, that the requirement to make a return on or before a return day could, under no circumstances, be satisfied by a return made thereafter, and a writ returnable within a number of days specified cannot, in any event, be returnable afterward.<sup>16</sup> A return made on Sunday has been adjudged void.<sup>17</sup> If a writ is by statute returnable at the term of the court next after which it bears teste, the officer is allowed all the days of the latter term in which to make his return, "unless he is ruled upon motion and cause shown to return it at some intermediate day,"<sup>18</sup> or he may, if he sees fit, return it on the first day of such term.<sup>19</sup>

When the officer has collected the money, or otherwise satisfied the writ, it would seem to be not only allowable but commendable for him to make his return at once, without awaiting the return day. In many instances, however, where the writ remains unsatisfied, its return is sought as the basis of some further writ or proceeding, which writ or proceeding depends for its validity on a previous valid return. In New York,

<sup>15</sup> *Backer v. Payne*, 130 Ind. 288, 30 Am. St. Rep. 231; *Bartlett v. Leathers*, 84 Me. 241; *Bogey etc. L. Co. v. Tucker*, 48 Minn. 223; *Davis v. Davis*, 128 Pa. St. 100; *Hirshfield v. Fort Worth N. B.*, 83 Tex. 452, 29 Am. St. Rep. 660.

<sup>16</sup> *Hawkins v. Tayler*, 56 Ark. 45, 35 Am. St. Rep. 82. See, also, *Haley v. Young*, 134 Mass. 364; *Ex parte Simpkin*, 2 Bl. & El. 392.

<sup>17</sup> *Peck v. Cavell*, 16 Mich. 9.

<sup>18</sup> *Person v. Newsom*, 87 N. C. 142.

<sup>19</sup> *Rowley v. Nichols*, 14 R. I. 14.

the rule has been established, by frequent adjudications, that the officer need not keep his writ until the return day. If he feels confident that the defendant has no property subject to execution, and is willing to assume the onus of establishing this fact, he may, before the return day, return the writ unsatisfied. Such a return, when made in good faith, is valid, and will support subsequent writs and proceedings to the same extent as if it were made on the return day.<sup>20</sup> So in North Carolina, a writ issued at one term, returnable at another, may be returned in vacation, though the sheriff has property in his custody under prior writs, if the value of all the property seized is less than sufficient to satisfy the prior writs, and the defendant has no other property subject to execution. There is no good reason why the sheriff should delay returning the writ, when it is apparent that nothing can be found out of which to satisfy it. It is rather his duty, "by promptly returning the facts, to open the way for supplemental proceedings, and aid the purpose for which the execution was placed in his hands."<sup>21</sup> Where an execution is returnable by statute within a designated period from its date, it would appear from some recent

<sup>20</sup> *Morange v. Edwards*, 1 E. D. Smith, 414; *Fake v. Edgerton*, 5 Duer, 681; *Tyler v. Willis*, 33 Barb. 327; *Renaud v. O'Brien*, 35 N. Y. 99; *Livingston v. Cleaveland*, 5 How. Pr. 396; *Forbes v. Walker*, 25 N. Y. 430; *High Rock K. Co. v. Bronner*, 43 N. Y. Supp. 684; 18 Misc. Rep. 631. See, to same effect, *Lovegrove v. Brown*, 60 Me. 598; *Dana v. Banks*, 6 J. J. Marsh. 219; *Thornton v. Lane*, 11 Ga. 524; *Wilcox v. Ratliff*, 5 Blackf. 561; *Bowen v. Parkhurst*, 24 Ill. 257. Under the chancery practice in New York, before the adoption of the code, a creditor's bill could not be filed until after the return day of the execution. When so filed, the bill could be sustained, although the return on the writ was in fact made and filed before the return day. *Williams v. Hogeboom*, 8 Paige, 469; *Platt v. Cadwell*, 9 Paige, 386; *Cassidy v. Meacham*, 8 Paige, 811.

<sup>21</sup> *Whitehead v. Hellen*, 74 N. O. 679.

decisions that courts quite willingly avail themselves of the opening thus offered, and hold that the writ goes into the officer's hands, "to be executed in good faith, without avoidable delay, according to the exigency of the writ, within the time fixed by the return day, and not necessarily to be held throughout such term."<sup>22</sup> Thus, the supreme court of Missouri, in construing the Kansas statute allowing an execution to be returned within a designated period from its date, held that an execution against a corporation, which was insolvent and had ceased to do business, might be returned before the expiration of the period,<sup>23</sup> while it holds to an opposite rule in construing the Missouri statute by which an execution is returnable in a designated period from its date.<sup>24</sup> This subtle distinction, if we may be pardoned, hedges close to the line which marks the vanishing point of reason.

The rule thus established in North Carolina and New York is in opposition to the majority of the authorities elsewhere. The fact that the defendant has no property subject to the writ when it comes to the officer's hands is, it is claimed, no assurance that he will continue to have none until the return day. It is also insisted that the time given to return a writ is designed partly for the benefit of the defendant, in order that the officer may not be forced to proceed with needless rigor. Hence, the courts of Michigan, Massachusetts, and Missouri have very decidedly pronounced against returns made before the return day, treating them not only as premature, but as insufficient to

<sup>22</sup> Findley v. Smith, 42 W. Va. 299; Tomlinson etc. M. Co. v. Shatto, 34 Fed. Rep. 380.

<sup>23</sup> Guerney v. Moore, 131 Mo. 650.

<sup>24</sup> Marks v. Hardy, 86 Mo. 232; Huhn v. Lang, 122 Mo. 600.

support further proceedings resting upon them.<sup>25</sup> In Maryland a return has been treated as no return because not made in term time.<sup>26</sup> We cannot avoid the conviction that the doctrine of the New York cases is agreeable with reason and conducive to justice. When it can be clearly shown that the defendant has no assets subject to the writ, there is no reason why the plaintiff's other remedies should continue in abeyance until the return day. The plaintiff may wish to prosecute proceedings at law supplemental to execution, or he may desire to file a creditor's bill in equity. In either case, his success usually depends upon the promptness with which he can act. It is cruel to compel him to remain idle waiting for the return day, thus affording the defendant ample opportunities to perfect such measures as may best enable him to elude all subsequent proceedings. The liability of an officer for not returning a writ at the proper time may be avoided by showing that his delay was occasioned by the instructions of the plaintiff or his attorney.<sup>27</sup>

Certain exigencies may also arise in which the court, to relieve the officer from special embarrassment not resulting from his own fault, will extend the time for making his return.<sup>28</sup> The lapse of the time within which the officer ought to have made his return does

<sup>25</sup> *Thayer v. Swift*, Harr. (Mich.) 430; *Steward v. Stevens*, Harr. (Mich.) 169; *Smith v. Thompson*, Walk. Ch. 1; *Williams v. Hubbard*, Walk. Ch. 28; *Beach v. White*, Walk. Ch. 495; *Schermerhorn v. Conner*, 41 Mich. 374; *Adams v. Cummiskey*, 4 Cush. 420; *Dillon v. Rash*, 27 Mo. 243; *Marks v. Hardy*, 86 Mo. 232; *Huhn v. Lang*, 122 Mo. 600; *Palmer v. Potter*, Cro. Eliz. 512. See, also, *Chalmers v. Moore*, 22 Ill. 359; *Austin v. Goodale*, 58 Me. 109.

<sup>26</sup> *Turner v. Walker*, 3 Gill & J. 377, 22 Am. Dec. 329.

<sup>27</sup> *Humphrey v. Hathorn*, 24 Barb. 278; *McKinley v. Tucker*, 6 Lans. 214; *Smith v. Smith*, 60 N. Y. 161; *Crouse v. Bailey*, 10 N. Y. Supp. 273.

<sup>28</sup> See § 275.



not terminate his power. He may, at any subsequent date, though no longer in office, make a return which he omitted to make in due time.<sup>29</sup> In many instances the officer may and must proceed after the return day to sell property previously levied upon. When this is the case, he must necessarily make a return of his proceedings subsequently to the return day. But his power to make such returns is not confined to cases in which it was necessary for him to complete the execution of his process after the return day. An order of a court of competent jurisdiction, staying the sheriff's proceedings, excuses him from returning the writ according to its requirements,<sup>30</sup> and postpones the return day, so that, in computing the time when the return should be made, the period during which proceedings under the writ were stayed by any valid writ or order must be excluded.<sup>31</sup>

**§ 354. By Whom to be Made.**—The return should be made by the officer who executed the writ, because he alone is answerable for the return in case it should prove false, and because he is ordinarily more conversant with the facts than any other person. Hence, it has been held that after the death of a sheriff, his return could not be amended by one who was then his successor in office, but had been his deputy when the return was made.<sup>32</sup> Where an officer is authorized to appoint a deputy, the deputy may act for him, and make the return in his name.<sup>33</sup> The act of the deputy

<sup>29</sup> *Rich v. Henry*, 4 Mackay, 155; *Main v. Lynch*, 54 Md. 669; *Remington v. Linthicum*, 14 Pet. 84.

<sup>30</sup> *People v. Carnley*, 3 Abb. Pr. 215.

<sup>31</sup> *Ansonia B. & C. Co. v. Conner*, 67 How. Pr. 157, 103 N. Y. 502. *Contra*, *Launtz v. Gross*, 16 Ill. App. 329.

<sup>32</sup> *Hudspeth v. Scarborough*, 60 Ga. 777.

<sup>33</sup> *Emley v. Drum*, 36 Pa. St. 123; *Mathewson v. Moore*, 2 McCord, 315; *State v. Johnston*, 1 Hayw. (N. C.) 293.

is the act of the principal. Hence, there is no impropriety in a return made and signed by the principal when the services were in fact performed by the deputy. The writing of the return need not necessarily be either by the sheriff or his deputy. If the officer cannot write, he may call upon another person to write out, in his presence and by his direction, a return, which the officer may sign by his mark,<sup>34</sup> and this course may doubtless be pursued, though the officer is able to write,<sup>35</sup> provided that which is written for him by another is done so immediately in his presence and by his direction that the act must be regarded as his, but the officer cannot delegate a general authority to another person, not his deputy, to make out and sign returns in his absence, as where the officer calls a person, requests his assistance in preparing papers for return to the court, and shows him several executions and asks him to make entries of nulla bona on all of them, and such entries are afterward written out in the sheriff's office, but while that officer is absent in the country.<sup>36</sup>

The rule is well settled that an agent ought to act in the name of his principal. No reason can be suggested why this rule ought not to be applied to returns made upon writs by deputy sheriffs or deputy constables. In a majority of the states, a return signed "A B, deputy," will be disregarded.<sup>37</sup> In Vermont, however, the courts seem to prefer that a writ exe-

<sup>34</sup> *Cox v. Montford*, 66 Ga. 62.

<sup>35</sup> *Ellis v. Francis*, 9 Ga. 325.

<sup>36</sup> *Weaver v. Wood*, 103 Ga. 88.

<sup>37</sup> *Joyce v. Joyce*, 5 Cal. 449; *Rowley v. Howard*, 23 Cal. 401; *Ryan v. Eads*, Breese, 217; *Ditch v. Edwards*, 1 Scam. 127, 26 Am. Dec. 414; *Simonds v. Catlin*, 2 Caines, 61, *Cole & C. Cas.* 346; *Ferguson v. Lee*, 9 Wend. 258; *Reinhart v. Lugo*, 86 Cal. 398, 21 Am. St. Rep. 53; *Gibbens v. Pickett*, 31 Fla. 147; *Glencoe v. People*, 78 Ill. 382; *Robinson v. Hall*, 33 Kan. 139.

cuted by a deputy should be returned by him in his own name.<sup>38</sup> In Michigan and South Carolina a return so made will be received and treated as valid.<sup>39</sup> A like view once prevailed in Texas,<sup>40</sup> but it has since been materially modified. When drawn in question collaterally such a return may, in the last-named state, possibly be respected. It is, however, certainly regarded as informal and improper, and will be vacated when directly called in question.<sup>41</sup>

A writ of execution should run to the sheriff in office at the time of its issue, and an indorsement on a writ by the person to whom it was issued after the expiration of his term as sheriff cannot be considered as an official return.<sup>42</sup> But a return is not invalid because made by one who, though previously elected to office, and, at the time of the return, performing the duties thereof, was merely a *de facto* officer, because he was not yet under bond.<sup>43</sup>

“If a writ be directed to the sheriff to be executed, and afterward a new sheriff is elected, the successor (if the writ be turned over to him) ought to return the writ with the old sheriff’s return thereon, and that he received the writ as above indorsed from his predecessor. Now, it is the practice for the late sheriff to make the return. If the sheriff dies during his year of office, the under-sheriff, before the appointment of a new sheriff, should make the return in the name of the de-

<sup>38</sup> *Eastman v. Curtis*, 4 Vt. 616.

<sup>39</sup> *Callender v. Olcott*, 1 Mich. 344; *De Villers v. Ford*, 2 McCord, 144.

<sup>40</sup> *Miller v. Alexander*, 13 Tex. 497, 65 Am. Dec. 73; *Towns v. Harris*, 13 Tex. 507.

<sup>41</sup> *Arnold v. Scott*, 39 Tex. 378; *Jordan v. Terry*, 33 Tex. 680.

<sup>42</sup> *Cotton v. Atkinson*, 53 Ark. 98.

<sup>43</sup> *Harrison v. Richardson*, 99 Ga. 763.

ceased sheriff.”<sup>44</sup> If the sheriff dies, the under-sheriff may act for him, but the other deputies cannot.<sup>45</sup> In Massachusetts, if an officer who has undertaken the service of an execution dies before completing such service and return, the same may be completed by any other officer who might, by law, have served the execution if originally delivered to him. So, a sheriff who, at the issuance of an execution and sale thereunder, was a deputy sheriff may complete the return thereof, the deputy sheriff who began the proceedings having died in the meantime.<sup>46</sup> If a vacancy is occasioned in the sheriff’s office otherwise than by his death, its duties do not devolve on the under-sheriff.<sup>47</sup>

§ 355. Form of Return.—Every officer intrusted with the service of an execution must make a return of his proceedings thereunder. This return must be in writing,<sup>48</sup> and signed by the sheriff or constable,<sup>49</sup> and filed in court.<sup>50</sup> The return cannot be oral. “It is evident that one object in requiring an officer to make a return of the writ is that the court and parties interested may know, first, whether the writ has been obeyed, and, if so, in what manner, and, if not executed, the reasons of the officer for failing to execute it. To this end the written certificate concerning these

<sup>44</sup> Watson’s Sheriff, 67; Ward v. Storey, 18 Johns. 120.

<sup>45</sup> Boardman v. Halliday, 10 Paige, 223.

<sup>46</sup> Firth v. Haskell, 148 Mass. 501.

<sup>47</sup> Paddock v. Cameron, 8 Cow. 212.

<sup>48</sup> Shover v. Funk, 5 Watts & S. 457; Purrington v. Loring, 7 Mass. 388; Wilson v. Loring, 7 Mass. 392; Wellington v. Gale, 13 Mass. 483; Jones v. Goodbar, 60 Ark. 182.

<sup>49</sup> Shepard v. Hill, 5 Ark. 308; Bennett v. Vinyard, 34 Mo. 216; Stevens v. Bachelder, 28 Me. 218; Dewar v. Spence, 2 Whart. 211, 30 Am. Dec. 241.

<sup>50</sup> The return is not complete till filed in court. State v. Melton, 8 Mo. 417; Nelson v. Cook, 19 Ill. 440; Welsh v. Joy, 13 Pick. 477.

facts is required. The bringing back of the writ by the officer, and filing it in the office of the sheriff or clerk from which it issued, together with this written certificate of his proceedings under it, indorsed on the writ or upon some paper attached thereto, constitute in law the return of the writ. Making this indorsement without the actual return of the writ is not a return, nor is it a return to bring back and file the writ without the certificate of the officer required to be indorsed, for both together constitute the return within the meaning of the statute.”<sup>51</sup>

If the officer is unable to write, he may have the return written under his directions, and may sign it with his mark.<sup>52</sup> The return is usually indorsed upon the writ; but, where convenience so requires, it may be written upon a separate paper and then attached to the writ.<sup>53</sup> In construing a return, all reasonable intendments will be indulged that the officer did his duty.<sup>54</sup> It is not indispensable that a return be dated, if it appears from other indorsements and record entries that it was made at a proper time.<sup>55</sup> As the return is intended as a history of the officer's proceedings, its form and substance should be such as will most correctly state that history. Usually, the transactions under the writ are such that the officer can make one of the four following returns: 1. In case no property subject to the writ has been found, he may

<sup>51</sup> Jones v. Goodbar, 60 Ark. 182.

<sup>52</sup> Cox v. Montford, 66 Ga. 62.

<sup>53</sup> Hammett v. Farmer, 26 S. C. 566. But it must not be on an unattached paper, or it will be disregarded. Dickson v. Peppers, 7 Ired. 429; Union Bank v. Barnes, 10 Humph. 244.

<sup>54</sup> State v. Still, 11 Mo. App. 283; Hale v. Talbott, 86 Ind. 447; Preston v. Wright, 60 Iowa, 351.

<sup>55</sup> Kightlinger's Appeal, 101 Pa. St. 540.

return that fact, and this is usually styled the return of "nulla bona"; 2. If he has obtained funds sufficient to satisfy the writ, the return is *feri feci*, or "I have caused to be made," etc.; 3. If part of the debt has been collected, and the remainder could not be, the return is *feri feci* as to part, and *nulla bona* as to the residue; 4. If a levy has been made, but the property could not from any cause be sold, the officer's return should show the levy, and that the property remains unsold.

Various exigencies arise, and necessitate special returns agreeable to the facts of each case. The more familiar of these exigencies occur when the execution is stayed, or the judgment or execution vacated, or the goods replevied, rescued, or lost by fire, or the levy released by the instructions of the plaintiff. In some of the states, the forms to be pursued in making returns are designated by statute. Such statutes are, however, regarded as directory; and a return varying from the form therein prescribed will not be disregarded if it sets forth substantially the matters required by statute.<sup>56</sup> We have already shown that the rights of purchasers at execution sales are not dependent upon the officer's return.<sup>57</sup> If this proposition is

<sup>56</sup> *Haden v. Walker*, 5 Ala. 86; *Casky v. Haviland*, 13 Ala. 314; *Millet v. Blake*, 81 Me. 531, 10 Am. St. Rep. 275.

<sup>57</sup> § 341; *Bray v. Marshall*, 75 Mo. 327; *Foster v. Berry*, 14 R. I. 601; *Bell v. Weatherford*, 12 Bush. 505; *Murray v. Chadwick*, 52 Vt. 293; *True v. Emery*, 67 Me. 28; *Gardner v. Elberhart*, 82 Ill. 316; *Pratt v. Pond*, 45 Conn. 386; *Holman v. Gill*, 107 Ill. 467. Contra, *Collins v. Hudson*, 69 Ga. 684. There are also other states in which the return is essential to the title of the purchaser at an execution sale. Thus, in Massachusetts, it has been said: "An officer's return of the levy of an execution upon real estate must show that all the requisites of the statute have been complied with, in order that a good title may appear of record, and the facts cannot be supplied by extrinsic evidence." *Rand v. Cutler*, 155 Mass. 451.

true, then the chief, and perhaps the only, office of a return is to show either that the writ has been satisfied, or that the officer is justified in returning it unsatisfied. "To be sufficient, the return must show upon its face that the command of the writ has been complied with, or the existence of such a state of facts as, without fault or negligence on the part of the officer, hindered such compliance."<sup>58</sup> In treating of the sufficiency of returns, we shall consider—1. Returns showing that the writ is wholly or partly unsatisfied, and seeking to excuse the officer for not compelling its satisfaction; and, 2. Returns showing that satisfaction has been produced.

§ 356. Sufficiency of Returns Showing the Writ to be Wholly or Partly Unsatisfied.—At the common law, a *feri facias* could be levied on chattels only. Hence, the words "nulla bona" were sufficient to indicate that the officer could discover nothing subject to the writ. Now lands can very generally be levied under *feri facias*, and the return that was formerly sufficient to show that no levy could be made is not, at present, sufficiently comprehensive to embrace one of the most important subjects of levy and sale. Courts are still in the habit of speaking in general terms of the return of "nulla bona" as though those words now constitute a complete return.<sup>59</sup> A more correct view was thus expressed by the supreme court of Alabama: "The terms 'nulla bona' are not of sufficiently extensive meaning to respond to the mandate of an execution. They import that the defendant in execution has no

<sup>58</sup> *McCrory v. Chaffin*, 1 Swan, 308; *Union Bank v. Barnes*, 10 Humph. 244; *Eaken v. Boyd*, 5 Sneed, 294; *Cowan v. Sloan*, 95 Tenn. 424.

<sup>59</sup> *Barker v. Dayton*, 28 Wis. 367.

goods which could be subjected to its satisfaction. Now, this may have been true, and yet he may have been in the possession or the owner of real estate, from the sale of which satisfaction could have been obtained.”<sup>60</sup> The officer who does not obtain anything toward the satisfaction of the writ must make a return in which it is directly stated, or from which it must necessarily be implied, that the defendant has no property subject to the writ;<sup>61</sup> or if he obtains a partial satisfaction of the writ, he must show why the residue was not realized. Upon receiving the writ, the officer incurs the liability to execute it. From this liability he can escape only by showing that he was released from it by the instructions of the plaintiff,<sup>62</sup> or that there were other sufficient legal excuses. These excuses he must state in his return, for the purpose of relieving himself from the liability created by the reception of the writ, and which continues until a sufficient return has been made. A sheriff having been instructed in writing by the assignee of an execution creditor to proceed with his execution cannot justify a return thereof unsatisfied on the ground that the attorney for such creditor directed the making of such return, because he knows that such creditor has parted with his interest in the judgment.<sup>63</sup> When a sheriff returns an execution nulla bona, he does so at his own risk, and must stand ready to justify his act.<sup>64</sup>

<sup>60</sup> Woodward v. Harbin, 1 Ala. 108.

<sup>61</sup> Hence, the officer cannot return that the defendant's premises were barred, and he therefore does not know whether or not the defendant has property subject to the writ. Munk v. Cass, 9 Dowl. Pr. 332.

<sup>62</sup> Wheeling P. Co. v. Levi, 48 La. Ann. 777.

<sup>63</sup> Murray v. Meade, 5 Wash. 693.

<sup>64</sup> Dornin v. McCandless, 146 Pa. St. 344, 28 Am. St. Rep. 798.



The most usual obstacle met by officers is their inability, after due search, to discover property subject to the writ. Where this has been the case, and it becomes necessary to return the writ wholly or partly unexecuted, the officer must exonerate himself by stating clearly and unequivocally that the writ is returned unsatisfied because the defendant has no property subject to its satisfaction.<sup>65</sup> In many instances, it is necessary to show by the return on an execution, for the purpose of sustaining some subsequent proceeding, that the defendant has no property subject thereto. This does not appear by the return of an execution

<sup>65</sup> *Burk v. Flourney*, 4 Mo. 116. "Wholly unsatisfied" is an insufficient return, because it does not show that no property could be found. *McDowell v. Clark*, 68 N. C. 118. For a like reason, "Came to hand, 8th Nov., 1820—no money made on this writ," is an insufficient return. *Harman v. Childress*, 3 Yerg. 327. A return is sufficient which recites that demand had been made for money or other property to satisfy the execution, and that neither had been received and the execution was returned not satisfied, no property being found in the county. *Horton v. Brown*, 45 Ill. App. 171. "No goods or chattels found" is sufficient. *Pioneer v. Bagnall*, 49 N. J. L. 226. Similarly, "No property found whereon to levy." *Dumas v. Matthews*, 51 N. J. L. 562. Compare *Newman v. Van Dwyne*, 42 N. J. Eq. 485; *Nimmo v. Howard*, 42 N. J. Eq. 487. "'I know of no property subject to the within fieri facias' is equivalent, in a collateral proceeding, to the return of nulla bona. It is his duty to find out any property within his bailiwick, and the presumption is, that he discharged his duty by making diligent search; and when he says he knows of no property subject to the fieri facias, it should be deemed, in a collateral proceeding, at least, equivalent to nulla bona." *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484. "No goods found in my county," though informal, is good in substance. — *v. Peebles*, Peck. 196. "Not levied for want of sufficient goods and chattels" is prima facie sufficient. *State v. Steel*, 11 Mo. 553. Where certain goods have already been levied upon, and a return of such levy has been made, a further return as follows: "Due search made by me, and no other goods, chattels, lands, or tenements to be found in my county, subject to execution, except what has heretofore been made and sent to your office," is sufficient. *McDowell v. Robison*, 3 Jones, 535. If there be two or more defendants, the return must show that neither has any property subject to

"not satisfied." Such a return conveys only the idea that the writ has not been paid. In some instances, the return of "nulla bona" may be sufficient, as where, by the construction given it, "it signifies that the officer made strict and diligent search, and was unable to find any property of the defendant liable to seizure under the writ whereof to levy the same."<sup>66</sup> A return "after search and inquiry, I know of no property of the defendant in the county upon which to levy this fieri facias," was held sufficient, though the execution commanded the officer to make the money of the goods and chattels that were of the estate of L. A. G., and that may have come into the hands of O. C. G., as administrator of her estate, to be administered. It was objected that from this return it was not possible to determine whether the sheriff meant that he could not find any property of the estate or of the administrator personally, but the court said that the most reasonable

execution. *Hassell v. Southern Bank*, 2 Head, 381. The following forms of returns, copied from *Walt's Practice*, volume 4, page 22, are concise and yet ample:

**RETURN OF NO GOODS FOUND.**

The defendant has no goods or chattels, lands, or tenements, within my county, whereof I can make the amount of the within execution, or any part thereof.

(Date.)

(Signature of Sheriff.)

**RETURN OF SATISFACTION IN PART.**

I have made the sum of — dollars, part of the moneys directed to be made upon the within execution; and I can find no goods or chattels, lands or tenements, of the within defendant in my county, whereof I can make the residue of the said execution.

(Date.)

(Signature of Sheriff.)

If there are two or more defendants, the following form, from *Impey on Sheriffs*, page 397, ought to be substantially followed: "The within-named A B and C D have not, nor hath either of them, any goods or chattels in my bailiwick, whereof I can cause to be levied the debt and damages within mentioned, or any part thereof."

<sup>66</sup> *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606.

construction to be given the return was, that the levying officer conducted his search for property such as was described in the writ, rather than for property owned by the administrator personally, and that "the return of an officer should receive every reasonable intendment and construction, and, where it is susceptible of different meanings, that meaning should be adopted which is most conformable to his legal duty."<sup>67</sup> The return of nulla bona does not necessarily imply that the defendant had no goods, nor that the officer made no levy. It is an appropriate return when, from any cause, there is nothing, at the date of the return, which can be appropriated to the satisfaction of the writ.

Property levied upon may be shown not to belong to the defendant, or it may be replevied, or consumed by prior liens, or rendered unproductive by a variety of other contingencies, not chargeable to the fault or neglect of the officer. In all such cases he may properly make a return of nulla bona.<sup>68</sup> The defendant may have sufficient property to satisfy the writ, and yet circumstances may occur justifying its return unexecuted. In such a case, the return should indicate what the circumstance was, and should present some reason for not executing the writ which will be deemed suffi-

<sup>67</sup> Gibson v. Robinson, 90 Ga. 756, 35 Am. St. Rep. 250.

<sup>68</sup> Wintle v. Freeman, 11 Ad. & E. 539; 39 Eng. Com. L. 159; Heenan v. Evans, 3 Man. & G. 398; Doker v. Hasler, 2 Bing. 479; 42 Eng. Com. L. 213; 4 Scott N. R. 2; 1 Dowl., N. S., 204; Champenois v. White, 1 Wend. 92; Grove v. Aldridge, 9 Bing. 428; 2 Moore & S. 568; Shattock v. Carden, 6 Ex. 725; 2 Lown. M. & P. 466; 21 L. J. Ex. 200; Evans v. Parker, 20 Wend. 622; Waterman v. Merrill, 33 N. J. L. 378; Blivin v. Bleakley, 23 How. Pr. 124; Bayley v. Bates, 8 Johns. 184; Van Cleef v. Fleet, 15 Johns. 147; Bank v. Pullen, 4 Dev. 297; Watt v. Johnson, 4 Jones, 190; Lummis v. Kasson, 43 Barb. 373; Magne v. Seymour, 5 Wend. 309; Townsend v. Phillips, 10 Johns. 98.

cient from a legal point of view.<sup>69</sup> If the property levied upon was released upon giving a delivery bond, that fact should be stated in the return. It has even been held that this fact must appear in the return, and that, if it does not so appear, the officer cannot prove it in his justification by the bond itself found in the record.<sup>70</sup> "Where, before seizure under execution, a writ of error is allowed, and no legal seizure can be made, although the return of nulla bona was held bad, yet the plaintiff was entitled only to nominal damages. The proper course would have been for him to have returned that such writ had been allowed, and the court would have relieved him."<sup>71</sup>

**§ 357. Return of Fieri Feci.**—We come now to speak of cases in which the officer has discovered and seized property subject to execution, or in which payment has been voluntarily made to him while the writ was in

<sup>69</sup> The following terms have been regarded as sufficient: "Enjoined," *Patton v. Marr*, Busb. 377; "Stayed by injunction," *Tagert v. Hill*, N. C. Conf. R. 164; "Stopped by order of plaintiff," *State v. McDonald*, 9 Humph. 606. That, after levy, plaintiff's attorney ordered the officer to withdraw from the possession of the goods levied. *Levy v. Abbott*, 7 Dowl. & L. 185; 4 Ex. 588; 19 L. J. Ex. 62. A return of "Not levied by reason of the stay law" is substantially a return that the money cannot be made, under a statute requiring that upon a writ of fieri facias the officer shall return whether the money therein mentioned is or cannot be made. *Hamilton v. McConkey's Ad.*, 83 Va. 533. But an officer cannot justify a failure to levy by showing that he was influenced by the debtor's promises to pay, or by sickness and distress in debtor's family. *Cowan v. Sloan*, 95 Tenn. 424.

<sup>70</sup> *Union Bank v. Barnes*, 10 Humph. 244. The following have been held not to be legal returns: "Case arranged in bank, as per instructions," *Gilchrist v. Branch Bank*, 11 Ala. 408; "The defendant has the plaintiff's receipt for the debt, interest, and costs in this case," *McKeagg v. Collehan*, 13 Ala. 828.

<sup>71</sup> *Impey on Sheriffs*, 395, citing *Cleghorn v. Desanges*, 8 B. Moore, 83.

his hands. In some instances, the single word "satisfied" indorsed on the writ has been regarded as a sufficient return.<sup>72</sup> This view is probably sustainable, at least where no sale of property has been made. But in many cases, levies and sales are made, and questions subsequently arise as to whether the return sufficiently discloses the subject matters of the levy and sale, and the steps necessary to constitute a valid levy and sale. The return of an officer, according to the opinion expressed at an early day by the supreme court of Minnesota, "should be a statement of facts, and not of any conclusions of law he might form as to what constituted a levy."<sup>73</sup> In Kentucky the court said: "It was certainly the duty of the officer in his return to give some general description of the land sold, to whom sold, and the steps taken by him in the sale."<sup>74</sup> In other cases, the rule is asserted that the description of lands levied upon must be specific.<sup>75</sup> In New Jersey each article of personal property must be separately mentioned.<sup>76</sup> In the preceding section we have expressed our concurrence in the position taken by the supreme court of Tennessee, when that court assumed that the object of a return was either to show that a writ had been executed, or else to disclose the reason why it remained unsatisfied. If this position is correct, then there is no reason why the officer should de-

<sup>72</sup> *Barton v. Lockhart*, 2 Stew. & P. 109; 4 Walt's Pr. 22.

<sup>73</sup> *Castner v. Symonds*, 1 Minn. 437.

<sup>74</sup> *Reid v. Heasley*, 9 Dana, 325. Compare *Lock v. Slusher* (Ky. App.), 43 S. W. 471, holding that a levy upon land is sufficiently recited by a statement in a sheriff's return that "after duly advertising the property levied on under this execution, to wit, describing the land, it was offered for sale."

<sup>75</sup> *Matthews v. Thompson*, 3 Ohio, 272; *Payne v. Billingham*, 10 Iowa, 360.

<sup>76</sup> *Watson v. Hoel*, 1 Coxe, 136; *Hustich v. Allen*, 1 Coxe, 168.

tail the various acts through which he has seized property or procured a satisfaction. "Nor do we consider it necessary, under our statute, that the sheriff should in his return state the particular or several acts done by him in making his levy. It is sufficient if he certifies in general terms that he 'levied,' and from this all the necessary proceedings will be implied."<sup>77</sup> In Texas, a return of a range levy upon cattle is regarded as defective if it fails to show just how the levy was made, but such a return does not, on its face, show a void levy where it raises a presumption that the levy included all the cattle of certain brands upon the range, although it may be uncertain how many cattle of each brand were intended to be covered.<sup>78</sup> "I find no authority requiring the premises to be particularly described in the sheriff's return."<sup>79</sup> "It is not requisite, however, that the sheriff should specify in his return the particular goods taken, and the sum for which each article has been sold. It is sufficient to make the return in general terms, as, for example, that he has levied a certain sum of money—naming it—out of the goods of the defendant. And accordingly, the court, in *Willett v. Sparrow*, 6 Taunt. 576, refused to grant a rule upon the sheriff to amend his return by particularly specifying the goods which he had taken under a writ of *fiери facias*, whereon he had returned merely an aggregate sum exceeding six hundred pounds, made of the goods of the defendant. Neither is it necessary that the time of the seizure by virtue of the *fiери facias* should be mentioned in the sheriff's return thereof."<sup>80</sup>

<sup>77</sup> *Tullis v. Brawley*, 3 Minn. 285; *Hutchins v. Commissioners*, 16 Minn. 13; *Rohrer v. Turrill*, 4 Minn. 407; *Byer v. Etnyre*, 2 Gill, 150, 41 Am. Dec. 410.

<sup>78</sup> *Brown v. Hudson*, 14 Tex. Civ. App. 605.

<sup>79</sup> *Jackson v. Walker*, 4 Wend. 464.

<sup>80</sup> *Fidler v. Patton*, 8 Watts & S. 458.

The officer must not leave it uncertain from his return whether the writ has been executed or not. If he states a levy, he should show whether the property has been sold or still remains in his custody.<sup>81</sup> "Executed October 18, 1832, as commanded within," was adjudged to be an imperfect return.<sup>82</sup>

**§ 358. Amending Returns.**—In the return of process, as in all other acts, mistakes may be made. These mistakes may consist either of the omission or the incorrect statement of material facts. The officer may be

<sup>81</sup> *Buckley v. Hampton*, 1 Ired. 322.

<sup>82</sup> *Ogle v. Coffey*, 1 Scam. 239. "Levied on the property of Benjamin Rice and Hosea Smith, July 13, 1818," was held void for uncertainty. *Law v. Smith*, 4 Ind. 56. "Execution returned not satisfied for want of bidders," was held bad, because it did not show that any levy had been made. *Bowman v. Mallory*, 14 Ind. 424. *Impey on Sheriffs*, page 397, gives the following form for a return where partial satisfaction has been realized, but the balance cannot be made: "By virtue of this writ to me directed, I have caused to be levied and made of the goods and chattels of the within-named C D to the value of forty pounds, which money I have ready; and the within-named C D hath not any other or more goods and chattels in my bailiwick whereby I can cause to be levied the residue of the debt and damages within mentioned, or any part thereof, as within I am commanded." The same work, page 398, gives the following form, where goods remain in the officer's hands for want of buyers: "By virtue of this writ to me directed, I have levied and made of the goods and chattels of the within-named C D to the value of forty pounds, as within I am commanded, which said goods and chattels remain unsold in my hands for want of buyers, therefore I cannot have the money before his Majesty at the day and place within mentioned as I am within commanded." The following form may be used where the writ is entirely satisfied: "I have made the amount of the within execution out of the goods and chattels, lands and tenements, of the within defendant, which I have ready to render to the within plaintiff," or "have paid the same to the within plaintiff." For returns to execution in various cases, see *Crocker on Sheriffs*, forms 194-207; 4 *Wait's Practice*, pp. 22-24; *Impey on Sheriffs*, 393-399. In England, an officer returning that he has levied on goods of the defendant must state their value. *Barton v. Gill*, 1 Dowl. & L. 593; 12 Mees. & W. 315; 13 L. J. Ex. 83.

sought to be made responsible for his mistake by proceedings against him for a false or an imperfect return; or the interests of third persons, dependent on the return, may be sought to be prejudiced or destroyed. In all cases where they can base their action upon matters of record, courts will exercise a very liberal discretion in amending and correcting their records so as to make them conformable to the truth.<sup>83</sup> If a return is incorrect, the court has no power to correct it, nor to compel its correction.<sup>84</sup> An officer is responsible for his return. He may make such return as he pleases, or he may altogether neglect to make any return whatever. In the one case the party injured has his remedy by an action for a false return; in the other, he may prosecute the officer for his failure to make a return. As the officer must respond in damages if his return be false, the impropriety of the court correcting a return, or in any respect dictating its contents, is obvious. It may be that the court may compel an officer to amend his return for the purpose of supplying obvious omissions therein. Thus in a case where a return did not describe real property, which had been levied on and sold, with sufficient particularity to enable the officer's successor to make a conveyance, the former officer was directed to so amend his return as to specifically describe such lands.<sup>85</sup> This may be regarded as compelling a return, rather than as requiring a re-

<sup>83</sup> Freeman on Judgments, c. 4.

<sup>84</sup> *Vastine v. Fury*, 2 Serg. & R. 426; *Boas v. Updegrove*, 5 Pa. St. 516, 47 Am. Dec. 425; *Washington Mill Co. v. Kinnear*, 1 Wash. 116; *Humphries v. Lawson*, 2 Eng. 341; *Sawyer v. Curtis*, 2 Ashm. 127; *Dixon v. White S. M. Co.*, 128 Pa. St. 397, 15 Am. St. Rep. 683. Apparently in conflict with this rule, it has been said that a party may, by motion, compel a sheriff to make a truthful return. *Matter of Dawson*, 20 Abb. N. C. 188.

<sup>85</sup> *Ex parte Worley*, 19 Fed. Rep. 586.



turn already made to be amended; for though an indorsement was made on the writ which purported to be a return, it was not entitled to that name, because it omitted matters upon which, in the judgment of the court, it was the duty of the officer to speak in his return. If we concede that the court may compel an officer to amend his return, the concession must be limited to enforcing a return sufficient on its face. The court cannot decide that particular acts were done or omitted, and then require the officer to amend his return to conform to such decision.

But usually when errors or omissions are discovered, the officer is anxious to avoid his liability by making the appropriate amendment. If the writ is still within his control, the return, though perhaps already written and signed, is not complete nor final, and he may alter it in any manner satisfactory to himself.<sup>86</sup> When it has once been filed, the return becomes a matter of record, and cannot be amended without permission of the court. This permission is usually granted on proper application<sup>87</sup> made in the cause in which

<sup>86</sup> *Welsh v. Joy*, 18 Pick. 477; *Nelson v. Cook*, 19 Ill. 440; *Spoor v. Holland*, 8 Wend. 445; *State v. Melton*, 8 Mo. 417; *Spencer v. Fuller*, 68 Ga. 73; *Dixon v. White S. M. Co.*, 128 Pa. St. 397, 15 Am. St. Rep. 683.

<sup>87</sup> *Mathes v. Dover N. B.*, 62 N. H. 491; *McArthur v. Carrie*, 82 Ala. 75, 70 Am. Dec. 529; *Moreland v. Ruffin*, 1 Minor, 8; *Gavitt v. Doub*, 23 Cal. 78; *Hopkins v. Bursh*, 3 Ga. 222; *Freeman v. Carhart*, 17 Ga. 348; *Mayer v. Chattahoochee Bank*, 46 Ga. 606; *Dunn v. Rodgers*, 43 Ill. 260; *Montgomery v. Brown*, 2 Gilm. 581; *Turney v. Organ*, 16 Ill. 43; *New A. & S. R. R. Co. v. Grooms*, 9 Ind. 243; *New A. & S. R. R. Co. v. Laiman*, 8 Ind. 212; *Jackson v. Ohio & M. R. R. Co.*, 15 Ind. 192; *Patterson v. State*, 2 G. Greene. 492; *De Wolf v. Mallett*, 3 Dana, 214; *Malone v. Samuel*, 3 A. K. Marsh. 350; *Buck v. Hardy*, 6 Greenl. 162; *Symonds v. Harris*, 51 Me. 14, 81 Am. Dec. 553; *Clarke v. Belmear*, 1 Gill & J. 443; *Berry v. Griffith*, 2 Har. & G. 337, 18 Am. Dec. 309; *Parker v. Warren*, 2 Allen, 187; *Thornton v. Miskimmon*, 48 Mo. 219; *Hart v. Adams*.

the writ issued.<sup>88</sup> In some cases permission to amend returns is spoken of as a matter of course, and, hence, it is claimed that the application therefor may be *ex parte*.<sup>89</sup> In defense of the rule sanctioning *ex parte* applications, it is insisted that, because the adverse party has a cause of action against the officer, if the return, as amended, can be shown to be false, there is no necessity for giving any opportunity to resist the application. But permission to amend should only be granted in furtherance of justice and in the exercise of an enlightened discretion. This discretion can never be properly exercised without a complete knowledge of all the facts of the case. This knowledge can be obtained only by summoning all the parties in interest before the court, and considering all the material and competent evidence they may be able to adduce. The object of the amendment of a record, whether made by the court in the entries on its minutes, judgments, or other proceedings, or by the sheriff in the history of his proceedings as stated in his return, is, or always should be, to obtain a record which shall

7 Gray, 581; *Hammond v. Eaton*, 15 Gray, 188; *Hutchins v. Commissioners*, 16 Minn. 13; *Corby v. Burns*, 36 Mo. 194; *Webster v. Blount*, 39 Mo. 500; *Planters' Bank v. Walker*, 3 Smedes & M. 409; *Barker v. Binniger*, 14 N. Y. 270; *Johnson v. Stone*, 40 N. H. 197, 77 Am. Dec. 706; *Dickinson v. Lippitt*, 5 Ired. 560; *Fowble v. Rayberg*, 4 Ohio, 59; *Vastine v. Fury*, 2 Serg. & R. 426; *Wright's Appeal*, 25 Pa. St. 373; *Rapin v. Dealy*, 1 Miles, 339; *Sheldon v. Comstock*, 3 R. I. 84; *Hill v. Hinton*, 2 Head, 124; *Broughton v. Allen*, 6 Humph. 96; *Atkinson v. Rhea*, 7 Humph. 59; *Mesner v. Lewis*, 20 Tex. 221; *Thomason v. Bishop*, 24 Tex. 302; *Thomas v. Browder*, 33 Tex. 783; *Dawson v. Moons*, 4 Munf. 535; *Walker v. Commonwealth*, 18 Gratt. 13, 98 Am. Dec. 631; *Bacon v. Bassett*, 19 Wis. 45; *Bull v. King*, 8 U. C. C. P. 474; *Lee v. Nellson*, 14 U. C. Q. B. 606.

<sup>88</sup> *Bishop v. Poundstone*, 11 Colo. App. 73.

<sup>89</sup> *Morris v. Trustees*, 15 Ill. 269; *Dunn v. Rodgers*, 43 Ill. 260; *Kitchen v. Reinsky*, 42 Mo. 427.

speaking the exact truth. A court will not, therefore, suffer a proposed amendment to be made without first being satisfied that it is true.<sup>90</sup> Even if the amendment proposed is true, the court will not permit it to be made, "when facts are untruly stated in other parts of the return, and when, if the whole return were amended so as to conform to the truth, the amendment would be ineffectual and useless. If any amendment is allowed, it must show the whole truth."<sup>91</sup> If returns may be amended only in furtherance of justice, and to make them speak the truth, it is obvious that the court should investigate the facts only after taking the precaution to bring before it all the parties interested in the question; for an *ex parte* proceeding is always taken at the risk of acting either upon partial truth or absolute falsehood. Hence, permission to amend a return ought not be treated as a matter of course, nor granted without first notifying the adverse party, and giving him an opportunity to show cause against the amendment.<sup>92</sup> It may be conceded that an amendment may be permitted on an *ex parte* application and hearing,<sup>93</sup> and that neither the order granting it, nor the amendment made pursuant to such order, is void; but we deny that the proceeding is *ex parte* in its nature, or that the court ought to proceed in the absence of the parties whose rights are imperiled by the return. The officer, instead of making an in-

<sup>90</sup> *Ex parte Bayley*, 132 Mass. 457; *Slatton v. Jonson*, 4 Hayw. (Tenn.) 196; *Williams v. Weaver*, 101 N. C. 1; *Excelsior M. Co. v. Boyle*, 46 Kan. 202.

<sup>91</sup> *Wolcott v. Ely*, 2 Allen, 338.

<sup>92</sup> *Coopwood v. Morgan*, 34 Miss. 368; *Williams v. Doe*, 1 Smedes & M. 559; *O'Conner v. Wilson*, 4 Chic. L. N. 217, 57 Ill. 227; *National Insurance Co. v. Chamber of Commerce*, 69 Ill. 22; *Carr v. Mead*, 77 Va. 159.

<sup>93</sup> *Kitchen v. Reinsky*, 42 Mo. 427; *Rickards v. Ladd*, 6 Saw. 40.

correct or imperfect return, may, through inadvertence, have filed the writ without making any return whatever. In such cases, he will usually be permitted to make a return *nunc pro tunc*; but as the fault is his, he may be required to pay the costs of the motion, and to submit to such other terms as the court may deem it just to impose.<sup>94</sup> A motion to amend is determined by the court. The parties are not entitled to a trial by jury.<sup>95</sup>

§ 359. The Time Within Which a Motion to Amend may be made has never been limited. The courts govern their action by the circumstances of each particular case. After the lapse of a long period, the means of correcting a return, and of determining whether the return, as first made, was not true and proper, may become so inadequate that the court will not feel justified in permitting any amendment. But whenever, even after the lapse of several years, it is satisfactorily proved that the original return is untrue, and that a true return can now be made, and, if made, that it will be in furtherance of justice, the courts will not hesitate to grant their permission for the correction of the old return.<sup>96</sup> An officer still in commission may amend a

<sup>94</sup> Hall v. Ayer, 19 How. Pr. 91; Nelson v. Brown, 23 Mo. 13; Ingram v. Belk, 2 Strob. 207; Williamson v. Farrow, 1 Bail. 611, 21 Am. Dec. 492; Bancroft v. Sinclair, 12 Rich. 617. The case of State v. Wylie, 2 McMull. 1, seems in conflict with these authorities.

<sup>95</sup> Morrill v. Fitzgerald, 36 Tex. 275.

<sup>96</sup> Jackson v. Esten, 83 Me. 162, 23 Am. St. Rep. 765; Woodward v. Harbin, 4 Ala. 534, 87 Am. Dec. 753; Jarboe v. Hall, 37 Md. 345; Williams v. Houston, 71 N. C. 163; Thatcher v. Miller, 11 Mass. 413, after six years; Rucker v. Harrison, 6 Munf. 181, after seven years; Gilman v. Stetson, 16 Me. 124, after twenty years; Scott v. Trustees, 5 U. C. Pr. R. 228, after ten years; Muldrow v. Bates, 5 Mo. 214; Blaisdell v. Steamer, 19 Mo. 157; Irvine v. Scobee, 5 Litt. 70, after sixteen years; Gaff v. Spellmeyer, 13 Ill. App. 294.

return of levy, so as to make it accord with the facts, even after the sale of the property levied upon.<sup>97</sup> It has sometimes been insisted that no officer ought to be permitted to make any amendment to his return after the expiration of his official term.<sup>98</sup> In support of this view, it is urged that a return ought always to be made under the solemnity of an official oath, and at a time when the person making it can be held responsible on his official bond. Certainly, this reason, while not so forcible as to warrant a court in withholding relief in meritorious cases, is sufficient to induce it to exercise unusual caution in permitting amendments, where the adverse party has practically no remedy, though the return, as amended, should be shown to be false. But in nearly all the states a return may be amended after as well as before the sheriff has gone out of office.<sup>99</sup> Where this rule is denied, it is upon the ground that the return should be made under the binding effect of an official oath, and that such effect does not survive the term of office for which it was taken.<sup>100</sup> It has also been held that a return cannot be amended after the death of the officer by whom it was made.<sup>101</sup> The correctness of this decision may

<sup>97</sup> *McLeod v. Brooks L. Co.*, 98 Ga. 253.

<sup>98</sup> *Jessup v. Gragg*, 12 Ga. 261; *Armstrong v. Easton*, 1 B. Mon. 66.

<sup>99</sup> *Adams v. Robinson*, 1 Pick. 641; *Wilson v. Ray*, T. U. P. Charlt. 109; *Johnson v. Donnell*, 15 Ill. 97; *Newton v. Prather*, 1 Duvall, 100; *Keen v. Briggs*, 46 Me. 467; *Miles v. Davis*, 19 Mo. 408; *Cushing v. Laird*, 4 Ben. 70; *Gay v. Caldwell*, 1 Hardin, 68; *Hutchins v. Brown*, 4 Har. & McH. 498; *Palmer v. Thayer*, 28 Conn. 237; *Avery v. Bowman*, 39 N. H. 393; *Blaisdell v. Steamboat*, 19 Mo. 157; *Dwiggins v. Cook*, 71 Ind. 579; *Ex parte Worley*, 19 Fed. Rep. 586; *Jeffries v. Rudloff*, 73 Ia. 60, 5 Am. St. Rep. 654; *Ex parte Lake*, 15 R. I. 628; *Telegraph C. Co. v. Fleischer*, 66 Fed. Rep. 905.

<sup>100</sup> *Shores v. Whitworth*, 8 Lea, 600; *Armstrong v. Easton*, 1 B. Mon. 66; *Jessup v. Gragg*, 12 Ga. 261.

<sup>101</sup> *Wilson v. Greathouse*, 1 Scam. 174.

well be doubted. At common law it was understood that after the death of a sheriff a return could be amended by his under-sheriff;<sup>102</sup> and we know of no reason why an amendment ought not to be allowed at the request of a sheriff's administrator.<sup>103</sup> In some states no amendment will be permitted after a motion has been made, or an action brought against the officer on account of a defective or false return.<sup>104</sup> In the vast majority of the states the rule is otherwise, and the pendency of a motion or action, instead of subverting the power of amendment, is the most frequent occasion in which that power is successfully invoked.<sup>105</sup> There may, however, be cases in which the amendment of a return may be refused after proceedings have been conducted, based upon the return, or even where the amendment might result in the loss of some right to a party, because he had been tardy in acting—because he relied upon the return as true.<sup>106</sup>

**§ 360. Of the Scope and Effect of Amendments, and the Persons Whose Rights the Courts will Protect Therefrom.**—It has sometimes been said that an amendment will not be permitted when it will destroy or materially alter the effect of the original return.<sup>107</sup> But this is a mistaken view. If an amendment does not alter the

<sup>102</sup> Watson on Sheriffs, 71.

<sup>103</sup> Scruggs v. Scruggs, 46 Mo. 273.

<sup>104</sup> Mullins v. Johnson, 3 Humph. 396; Howard v. Union Bank, 7 Humph. 26; Brinkley v. Mooney, 4 Eng. 445.

<sup>105</sup> Hodges v. Laird, 10 Ala. 678; Niolin v. Hamner, 22 Ala. 578; Gorham v. Hood, 27 Ga. 299; Trotter v. Parker, 38 Miss. 473; People v. Ames, 35 N. Y. 482, 91 Am. Dec. 64; Cody v. Quinn, 6 Ired. 191, 44 Am. Dec. 75; Thomas v. Browder, 33 Tex. 783; Wardsworth v. Miller, 4 Gratt. 99; Stone v. Wilson, 10 Gratt. 529; Stealman v. Greenwood, 113 N. C. 355; Swain v. Burden, 124 N. C. 16.

<sup>106</sup> Carr v. Mead, 77 Va. 142; Freeman v. Paul, 3 Greenl. 260.

<sup>107</sup> Barton v. Lockhart, 2 Stew. & P. 109.

return in some material respect, it is hardly worth seeking permission to make it. A return may be amended by affixing to it the signature of the officer, and thus making valid that which before had no appearance of official authenticity.<sup>108</sup> Returns are constantly amended in other material respects, and their whole nature is often completely transformed by canceling the old return and substituting therefor a return of an entirely different character.<sup>109</sup> When an amendment is made, the return as amended is to be given the same effect as though it had at first been put in its present form. In other words, the amendment takes effect by relation, and operates as if made at the same time as the original return.<sup>110</sup> Amendments are granted only in furtherance of justice. Unless the equities of the applicant are superior to those of the contestant, the courts will refuse to act.

Amendments will not be authorized if they tend to impair vested rights, acquired in good faith, by innocent third parties.<sup>111</sup> Amendments may be allowed in conformity with the facts even after the rights of

<sup>108</sup> *Childs v. Barrows*, 9 Met. 413; *Wilton M. Co. v. Butler*, 34 Me. 431; *Glidden v. Philbrick*, 56 Me. 222; *Rutherford v. Crawford*, 53 Ga. 138; *Excelsior M. Co. v. Boyle*, 46 Kan. 202. A justice of the peace was permitted to amend the jurat to an affidavit by signing it nunc pro tunc. *Veal v. Perkerson*, 47 Ga. 92.

<sup>109</sup> *De Wolf v. Mallett*, 3 Dana, 214; *Woods v. Cooke*, 61 Me. 215; *Dickinson v. Lippitt*, 5 Ired. 560; *Williams v. Houston*, 71 N. C. 163; *Morrill v. Fitzgerald*, 36 Tex. 275.

<sup>110</sup> *McArthur v. Currie*, 32 Ala. 75, 70 Am. Dec. 529; *Brandon v. Snows*, 2 Stew. 255; *Mason v. Anderson*, 3 T. B. Mon. 295; *Haven v. Snow*, 14 Pick. 28; *Newton v. Prather*, 1 Duvall, 100; *Richards v. Ladd*, 6 Saw. 40.

<sup>111</sup> *Newhall v. Provost*, 6 Cal. 85; *Webster v. Haworth*, 8 Cal. 25, 68 Am. Dec. 287; *Davidson v. Cowan*, 1 Dev. 304; *Jackson v. Esten*, 83 Me. 162, 23 Am. St. Rep. 765; *Briggs v. Hodgdon*, 78 Me. 514; *Allison v. Thomas*, 72 Cal. 562, 1 Am. St. Rep. 89; *McCrath v. Wallace*, 116 Cal. 533; *Chicago etc. Co. v. Merchants' N. B.*, 97 Ill. 300. The statutes of Pennsylvania provide that if a sheriff

third parties have intervened, if the record shows that the requisites of the statute have probably been complied with, and if such third parties may be deemed to have acquired their rights in reliance upon, and with notice of, the recitals in the record. These cases, however, cannot be considered as raising an exception to the general rule which saves the rights of innocent purchasers from the effect of such amendments.<sup>112</sup>

makes a defective or informal return of his proceedings under execution for the sale of real estate, it shall be lawful for the purchaser or other persons interested to apply by bill or petition to the court, setting forth the facts, and, after due notice to all the persons interested, the court shall have power to examine into the facts of the case and make such order or decree therein as justice and equity may require, either by dismissing such bill or petition, or by correcting and amending such return according to the truth of the case. Under this statute, an application was made by a sheriff to amend his return, on the ground that he omitted therefrom one of the properties sold. To his petition the answer was made that the omission in question was not the result of accident or mistake, but of design, and that at the time the return was made it was the intention of all the parties in interest to make no return respecting the property omitted. The court, in denying the petition, said that the sheriff had no standing as petitioner, unless he had an interest, and that he does not appear to have any, and that it was evident that he was not acting now for his own protection, or in a matter in which he had any interest, but to serve the purpose of another, who has no equity whatever. Certain expressions in the opinion of the court, standing by themselves, would support the false conclusion that an amendment will not be granted unless the sheriff has some interest therein, whereas such amendments are ordinarily granted because some party other than the sheriff is entitled thereto for the protection of his right or title. The real ground of decision, notwithstanding the general expression of the court respecting the want of interest on the part of the sheriff, was that, if the amendment were granted, it would not truly state the facts as they were understood to be and were at the time of the return, and would include property in the return and describe it as sold when it was not at the time understood or intended to be sold. *Lowenstein v. Krell*, 162 Pa. St. 267. The allowance of amendments, as against third persons, will be found treated in a subsequent section.

<sup>112</sup> *Jackson v. Esten*, 83 Me. 162, 23 Am. St. Rep. 765; *Glidden*



The general principles applicable to the amendments of returns are stated with great precision and conciseness in the following extract from an opinion of the supreme court of Missouri: "The right of a sheriff to amend a defective return, on leave of the court, is beyond question, and it makes no difference that he is out of office. Such amendments, in appropriate cases, are allowed even on application of the sheriff's administrator. And there is no specific limitation of time within which this class of amendments must be made; although, after a lapse of years, the court should grant applications with great caution, lest the rights of innocent third parties should be injuriously affected. Such applications are not granted as a matter of right. The granting of them rests in the sound discretion of the court. 'Amendments of this description,' say the court in *Johnson v. Day*, 17 Pick. 108, 'are not regulated by any certain rules, but the court is bound in every case to exercise a sound discretion, and to allow or disallow an amendment, as may best tend to the furtherance of justice. The forms of the court are always best used when they are made subservient to the justice of the case.' " <sup>113</sup> In Maine, the courts will not allow a return to be so amended as to destroy the title of one who purchased property at a sale made by the officer, "although the purchaser was the judgment creditor in the execution on which the property was sold." <sup>114</sup> Subsequent facts with which the officer had no connection cannot be inserted in a return by amend-

*v. Philbrick*, 56 Me. 224; *Peaks v. Gifford*, 78 Me. 362; *Saunders v. First N. B.*, 61 N. H. 31; *Whittier v. Varney*, 10 N. H. 291.

<sup>113</sup> *Scruggs v. Scruggs*, 46 Mo. 278.

<sup>114</sup> *Farrington v. Anson*, 77 Me. 405.

ment, as that the purchase money was paid to the judgment creditor after the return day of the writ.<sup>115</sup>

§ 361. **Quashing Returns.**—The power of courts to set aside or cancel the returns of their officers, indorsed on writs of execution, is conceded;<sup>116</sup> but the causes necessary to procure the exercise of this power are not very clearly defined. “Where the levy and returns made are not in accordance with the law, they may be quashed; or where facts are stated which show there was no levy in fact, the return may be vacated and set aside.”<sup>117</sup> While returns may sometimes be quashed on account of irregularity, the best—or, at least, the most meritorious—ground for such a proceeding is, that the return as made is, from mistake or otherwise, false in fact. Thus a writ may be returned satisfied when no satisfaction was produced. In this and in other instances in which one of the parties is injured, he is not compelled to abide by the return, and seek to indemnify himself by an action against the officer. He may, on motion supported by proper proofs, procure an order vacating the return.<sup>118</sup> Instead of directly vacating the return, the courts of the state of New York usually enter an order allowing the sheriff to withdraw the writ from the files, and cancel his return thereon.<sup>119</sup> The party to be injured by vacating

<sup>115</sup> *Bibb v. Collins*, 51 Ala. 450.

<sup>116</sup> *Tutt v. Fulgham*, 5 How. (Miss.) 621; *Holt v. Robinson*, 21 Ala. 106, 56 Am. Dec. 240; *Scott v. Allen*, 1 Tex. 508; *Jarboe v. Hall*, 37 Md. 345.

<sup>117</sup> *Bryan v. Bridge*, 6 Tex. 137.

<sup>118</sup> *McMichael v. Branch Bank*, 14 Ala. 196; *Forsyth v. Marriott*, 1 Bos. & P., N. S., 251; *Burks v. Maine*, 16 East, 2; *Ward v. Brumfit*, 2 Maule & S. 238; *Osborne v. Wilson*, 37 Minn. 8; *Matter of Dawson*, 20 Abb. N. C. 188.

<sup>119</sup> *Barker v. Binniger*, 14 N. Y. 270; *James v. Gurley*, 48 N. Y. 163; *Flanagan v. Tinin*, 37 How. Pr. 130, 53 Barb. 587.

a return must be given notice of the time and place of hearing the motion, and given an opportunity to defend;<sup>120</sup> but he is not entitled to a jury trial.<sup>121</sup> The quashing of a return does not necessarily vacate a sale which the return shows to have been made.<sup>122</sup>

§ 362. In Construing Official Returns, the courts have usually exercised great liberality toward the officer and others interested in maintaining the sufficiency and legality of the returns. In considering returns, no severity of criticism will be allowed; every favorable inference that can fairly arise from the language used will be indulged; the whole return will be considered; nothing beyond reasonable certainty will be exacted; and that construction will be adopted which most accords with the hypothesis that the officer performed his whole duty.<sup>123</sup> A return that the defendants have no property subject to execution will be construed as equivalent to saying that neither of the defendants has any such property.<sup>124</sup> Where an officer returns that he has sold and delivered the property under an execution, but does not recite a levy, it will be inferred that he made a levy prior to the sale.<sup>125</sup>

<sup>120</sup> Mann v. Nichols, 1 Smedes & M. 257; Parks v. Person, 1 Smedes & M. Ch. 76.

<sup>121</sup> Anderson v. Carlisle, 7 How. (Miss.) 408; Morton v. Walker, 7 How. (Miss.) 554.

<sup>122</sup> Schobee v. Dedman, 2 Litt. 116.

<sup>123</sup> Bacon v. Bevan, 44 Miss. 293; Whittlesey v. Starr, 8 Conn. 134; Coggsell v. Warren, 1 Curt. 223; Franklin Bank v. Blossom, 23 Me. 546; Reynolds v. Barford, 8 Scott N. R. 233; 7 Man. & G. 449; 2 Dowl. & L. 327; 8 Jur. 961; 13 L. J. Com. P. 177; Millet v. Blake, 81 Me. 531, 10 Am. St. Rep. 275; Wilson v. Swasey (Tex.), 20 S. W. 48; Gibson v. Robinson, 90 Ga. 756, 35 Am. St. Rep. 250.

<sup>124</sup> Austin v. Figueira, 7 Paige. 56; Conant v. Sparks, 8 Edw. Ch. 104; Winchester v. Crandall. 1 Clarke Ch. 371.

<sup>125</sup> Howard v. Baum, 73 Mo. App. 235.

§ 363. **Returns as Evidence.**—When a return is made and filed, it becomes a part of the record of the case in which it issued.<sup>126</sup> If we keep this fact in view, we shall usually be able to determine without difficulty whether a return can properly be admitted in evidence, and the effect to be given to it when it is so admitted. Whenever the record in a case is competent evidence, the return, because it is a part of that record, is also, as a general rule, competent evidence. If the case is one in which the record is conclusive between the parties, the return is also conclusive between them. If, on the other hand, the record is not conclusive between the parties, the return cannot be regarded as conclusive upon them. We do not, in this section, propose to consider the effect of a return, but only to treat of the cases in which it is entitled to be considered as competent evidence, because at least tending to prove the facts stated therein. Upon this subject we believe this general rule to be applicable: that whenever the execution can properly be placed in evidence, the return may also be admitted, and may operate as at least *prima facie* evidence of all the facts therein set forth, and which it was the officer's duty to embody in his return.<sup>127</sup> These facts must be confined to things done by himself. The return is a history of his proceedings, not of the proceedings or acts of other persons. He is not the accredited historian of their acts, and if he

<sup>126</sup> *Whiting v. Bradley*, 2 N. H. 81; *Pigot v. Davis*, 3 Hawks, 25; *Hardy v. Gascoignes*, 6 Port. 447; *Ferguson v. Tutt*, 8 Kan. 377; *Gardner v. Hosmer*, 6 Mass. 325; *Andrews v. Lynton*, 1 Salk. 265; *Newton v. State Bank*, 14 Ark. 9, 58 Am. Dec. 363.

<sup>127</sup> *Lothrop v. Abbott*, 16 Me. 421; *Polley v. Lenox Iron Works*, 4 Allen, 329; *Ufford v. Dickinson*, 12 Allen, 543; *Cowls v. Hastings*, 9 Met. 476; *Pigot v. Davis*, 3 Hawks, 25; *Platt v. Platt*, 9 Ohio, 37; *Nichol v. Ridley*, 5 Yerg. 63, 26 Am. Dec. 254; *Stanton v. Hodges*, 6 Vt. 64; *Day v. Roberts*, 8 Vt. 413.

undertakes this duty in his return, what he says is unofficial, and is not competent evidence for or against any one. He has no right to state in his return that the judgment has been satisfied by the defendant,<sup>128</sup> or that "the defendant has plaintiff's receipt for the debt, interest, and costs in this case."<sup>129</sup> "There is no provision for a return showing the acts of any one but the officer. A statement in the return purporting to show the acts of any one other than the officer is without authority of law, and surplusage."<sup>130</sup> We shall now consider—1. The effect of a return between the parties to the suit in which it was made; 2. Its effect for or against strangers to such suit; and 3. Its effect as evidence for or against the officer who made it.

**§ 364. The Effect of a Return Between the Parties.—**We have already stated that the effect of a return may generally be known by knowing the effect which the record has between the same parties. It is everywhere understood that the original parties to a suit cannot falsify the record therein; that, as against them, the record imports absolute and uncontrollable verity. From this verity they can escape only through some proceeding to vacate or annul the record. When an officer makes a false return, it must, as between the parties to the suit, as long as it remains unvacated, be regarded as true. Neither can dispute or impeach it. As to all the facts which the officer had authority to return, it must be treated as unquestionable, and as entirely beyond the reach of any collateral assault.<sup>131</sup>

<sup>128</sup> *Abercromble v. Chandler*, 19 Ala. 625.

<sup>129</sup> *McKeagg v. Collehan*, 13 Ala. 828.

<sup>130</sup> *Aultman v. McGrady*, 58 Iowa, 118.

<sup>131</sup> *Kirksey v. Bates*, 1 Ala. 303; *Newton v. State Bank*, 14 Ark. 9, 58 Am. Dec. 363; *Tillman v. Davis*, 28 Ga. 494, 73 Am. Dec. 786;

"A sheriff's return is not traversable, and the court will not permit it collaterally to be attacked, even if the officer is shown to have been guilty of fraud and collusion."<sup>132</sup> An officer will not be permitted, when

*Brown v. Way*, 28 Ga. 531; *Rivard v. Gardner*, 39 Ill. 125; *Rowell v. Klein*, 44 Ind. 290; *Hamilton v. Matlock*, 5 Blackf. 421; *Burger v. Becket*, 6 Blackf. 61; *Smith v. Hornback*, 3 A. K. Marsh. 392; *Small v. Hodgen*, 1 Litt. 16; *Sergeant v. George*, 5 Litt. 198; *Caldwells v. Harlan*, 3 T. B. Mon. 351; *Tribble v. Frame*, 3 T. B. Mon. 51; *McConnel v. Bowdry*, 4 T. B. Mon. 392; *Stinson v. Snow*, 10 Me. 263, 25 Am. Dec. 238; *Huntress v. Tiney*, 39 Me. 237; *Grover v. Howard*, 31 Me. 546; *Tyler v. Smith*, 8 Met. 599; *Dooley v. Wolcott*, 4 Allen, 406; *Campbell v. Webster*, 15 Gray, 28; *Tullis v. Brawley*, 8 Minn. 277; *Frasier v. Williams*, 15 Minn. 288; *Halowell v. Page*, 24 Mo. 590; *Clough v. Monroe*, 34 N. H. 381; *Bolles v. Bowen*, 45 N. H. 124; *State v. Clerk*, 1 Dutch. 209; *Castner v. Styer*, 3 Zab. 236; *Allen v. Martin*, 10 Wend. 300; *Boomer v. Laine*, 10 Wend. 525; *Bank of Gallipolis v. Domigan*, 12 Ohio, 220, 40 Am. Dec. 475; *Paxson's Appeal*, 49 Pa. St. 195; *Sample v. Coulson*, 9 Watts & S. 62; *Diller v. Roberts*, 13 Serg. & R. 60, 15 Am. Dec. 578; *Pratt v. Phillips*, 1 Sneed, 543, 60 Am. Dec. 162; *Hill v. Grant*, 49 Pa. St. 200; *Rice v. Groff*, 58 Pa. St. 116; *O'Connor v. Silver*, 26 Tex. 606; *Wood v. Doane*, 20 Vt. 612; *Knowlton v. Ray*, 4 Wis. 288; *Carr v. Commercial Bank*, 16 Wis. 50; *Wilson v. Hurst*, 1 Pet. C. C. 441; *Miller v. United States*, 11 Wall. 294; *Brown v. Kennedy*, 15 Wall. 597; *Fenwick v. Fenwick*, 2 W. Black. 788; *Gardner v. Cover*, 1 Gale, 45; *Carlile v. Parkins*, 3 Stark. 163; *Delinger v. Higgins*, 26 Mo. 180; *Stewart v. Stringer*, 41 Mo. 400, 97 Am. Dec. 298; *Hollands & Franklin's Case*, 1 Leon, 183; *Stratford v. Twynan*, 1 Jacob, 418; *Folsom v. Carll*, 5 Minn. 333, 80 Am. Dec. 429; *McDonald v. Leewright*, 31 Mo. 29, 77 Am. Dec. 631; *Hunt v. Weiner*, 39 Ark. 70; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551; *Green v. Kindy*, 43 Mich. 279; *Reynolds v. Ingersoll*, 11 Smedes & M. 249, 49 Am. Dec. 57; *Michels v. Stork*, 52 Mich. 260; *Stevens v. Brown*, 3 Vt. 420, 23 Am. Dec. 215; *Clark v. Shaw*, 79 Ind. 164; *Walters v. Moore*, 90 N. C. 41; *Baker v. Baker*, 125 Mass. 7; *Estes v. Cooke*, 12 R. I. 6; *Barrows v. National Rubber Co.*, 13 R. I. 48; *Fry v. Gallasple*, 61 Ind. 478; *Stewart v. Stewart*, 27 W. Va. 167; *High Rock R. Co. v. Bronner*, 43 N. Y. Supp. 684; *Nash v. Muldoon*, 16 Nev. 414; *Flaniken v. Neal*, 67 Tex. 629; *Schneider v. Ferguson*, 77 Tex. 577; *Irwin v. Smith*, 66 Wis. 113.

<sup>132</sup> *Egery v. Buchanan*, 5 Cal. 53; *Higgs v. Huson*, 8 Ga. 317; *Smith v. Noe*, 30 Ind. 117; *Mueller v. Bates*, 2 Disn. 318; *Stoors v. Kelsey*, 2 Paige, 418; *Angell v. Bowler*, 3 R. I. 77; *Love v. Smith*, 4 Yerg. 117; *Ayres v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657; *United States v. Lotridge*, 1 McLean, 246.

called as a witness, to give testimony contradicting or impeaching his own return.<sup>133</sup> The return may be ambiguous, or may not be so specific as to show all the acts done by the officer. In such a case, evidence may properly be received in explanation of the return, or to establish the existence of facts of which the officer omitted to make any sufficient statement.<sup>134</sup>

A return showing the sale of property and the payment of the sum bid may be explained by showing that no money was paid except the costs, and that the amount of the bid, less the costs, was paid by crediting it on the execution.<sup>135</sup> But the return cannot, unless amended, be modified so as to show that other lands were levied upon in addition to those described in the return.<sup>136</sup> If the return shows that a notice of sale was published in a particular manner, it cannot be disproved by producing the notice itself or the paper in which it was returned as published, though it may appear, from the notice or paper, that such notice was not as stated in the return or was not published in the paper.<sup>137</sup>

A return must be treated as correct until it is vacated. Hence, if a writ be returned "satisfied," the

<sup>133</sup> Benjamin v. Hathaway, 3 Conn. 528; Cowan v. Wheeler, 31 Me. 439; Martin v. Barney, 20 Ala. 369; Doe v. Snyder, 3 How. (Miss.) 66; Planters' Bank v. Walker, 3 Smedes & M. 409; Pratt v. Phillips, 1 Sneed, 543, 60 Am. Dec. 162; Heffner v. Reed, 3 Grant Cas. 245; Wyer v. Andrews, 13 Me. 168, 29 Am. Dec. 497.

<sup>134</sup> Chamberlain v. Brewer, 3 Bush, 561; Scott v. Sheakly, 3 Watts. 50; Dolan v. Briggs, 4 Binn. 499; Leonard v. O'Neal, 16 Lea, 158; Little v. Delancey, 5 Binn. 266; Weidensaul v. Reynolds, 49 Pa. St. 73; Hoffman v. Danner, 14 Pa. St. 25; Guild v. Richardson, 6 Pick. 364; Knowles v. Lord, 4 Whart. 504, 34 Am. Dec. 525; Susquehanna Boom Co. v. Finney, 58 Pa. St. 200; Atkinson v. Cummins, 9 How. 479.

<sup>135</sup> Johnson v. State, 80 Ind. 220.

<sup>136</sup> Wills v. McKinney, 41 N. J. L. 120.

<sup>137</sup> True v. Emery, 67 Me. 28; Sykes v. Keating, 118 Mass. 517.

clerk has no authority to issue an alias on the ground that the return of satisfaction was made by mistake.<sup>138</sup> The effect of a return must always be restricted to those facts which it was the duty of the officer to state.<sup>139</sup> In Connecticut and Louisiana returns are never conclusive unless against the officers who made them. They may be disputed and disproved by the parties to the suit as well as by strangers.<sup>140</sup> In New York a return showing the execution of a writ of possession is not conclusive; and it may be contradicted by proving that the persons in possession were never dispossessed. The reasons for maintaining this apparent exception to the general rule are not stated, and the authorities cited in its support relate to other topics.<sup>141</sup>

**§ 365. The Effect of a Return as Evidence Against Strangers to the Suit.**—A record is usually said to be conclusive only upon the parties thereto, and their privies in blood or in estate. Notwithstanding this general rule of law, there are numerous instances in

<sup>138</sup> *Harkins v. Clemens*, 1 Port. 30; *Haden v. Walker*, 5 Ala. 86.

<sup>139</sup> *Shannon v. McMullin*, 25 Gratt. 211; *First v. Miller*, 4 Bibb, 311; *Cator v. Stakes*, 1 Maule & S. 599; *Bruce v. Dyall*, 5 T. B. Mon. 125.

<sup>140</sup> *Butts v. Francis*, 4 Conn. 424; *Watson v. Watson*, 6 Conn. 334; *Sanford v. Nichols*, 14 Conn. 324; *Succession of Goodrich*, 6 Rob. (La.) 107; *Lafon v. Smith*, 3 La. 476; *Lawrence v. Young*, 1 La. Ann. 297; *Waddell v. Judson*, 12 La. Ann. 13; *Grant v. Harris*, 16 La. Ann. 323. The decisions in North Carolina were apparently in harmony with those in Connecticut and Louisiana. *Den v. Low*, 5 Ired. 197; *Patterson v. Britt*, 11 Ired. 383; *Jackson v. Jackson*, 13 Ired. 159; but later decisions accord with the majority of the authorities elsewhere. *Walters v. Moore*, 90 N. C. 41. In Tennessee the defendant may, in opposition to an officer's return, defeat an execution sale by showing that proper notice was not given. *Trott v. McGavock*, 1 Yerg. 469; *Rogers v. Jennings*, 3 Yerg. 308; *Loyd v. Anglin*, 7 Yerg. 428.

<sup>141</sup> *Newell v. Whigham*, 102 N. Y. 20.



which records may be admitted in evidence in controversies between other persons than the original parties thereto and those in privity with such parties. And in some cases the effect of a record must be conclusive, though offered in evidence against a stranger. Thus, a judgment in a case may be employed for the purpose of showing that property once vested in one of the parties to the suit has been transferred to the other, or to some third person. When offered in evidence for this purpose, it cannot be collaterally attacked. It is a muniment of title. Like other muniments of title, it is competent to prove a transfer, whether the controversy is between the original parties or between strangers. Such strangers cannot impeach it without showing that it was fraudulently procured for the purpose of prejudicing their rights. A return may, in like manner, be conclusive against a stranger when it is offered in evidence in connection with an execution, for the purpose of showing what proceedings were taken to divest the title of the defendant. A return, as long as it remains in force, is confessedly conclusive on the parties to the suit. Its conclusive effect would be practically destroyed if strangers were permitted, as mere volunteers, to dispute that which the parties to the proceeding were estopped from denying. Hence, persons who had no interest in a return when it was made cannot impeach it for the purpose of destroying its effect between the parties.<sup>142</sup> Where a purchaser

<sup>142</sup> *Phelps v. Parks*, 4 Vt. 488. Proceedings under execution, though tainted with irregularities, are usually valid between the parties to the writ, until vacated by some appropriate motion or action. If the parties do not see proper to make such motion, or institute such action, they waive the irregularity and impart conclusive validity to the proceeding. What the parties, by their non-action, choose to confirm, strangers cannot impugn. Hence the gen-

of land at execution sale brought ejectment against the wife of the execution debtor who claimed title under a conveyance unrecorded at the time of the sale, the defendant was not allowed to contradict the officer's return reciting that defendant had no goods or chattels whereof to satisfy the writ.<sup>143</sup> But a return, when made, may state facts which, if proved, would produce a material effect upon the interests of a stranger to the writ. The question then arising is this: Can such return be received as evidence for or against such stranger? and if so, what effect must be given to it? The answers to these questions, given by the different authorities, are very uniform, and are to the effect that a return, as to the facts which the officer was required to state in it, is *prima facie*, but not conclusive, evidence for or against a stranger to the suit.<sup>144</sup>

eral rule that strangers to a suit will not be allowed to impeach or deny that which the parties treat as valid and indisputable. *Fournier v. Curry*, 4 Ala. 321; *Savage v. Forward*, 7 Ala. 463; *Smith v. Houston*, 16 Ala. 111; *Swiggart v. Harber*, 4 Scam. 364, 39 Am. Dec. 418; *Durham v. Heaton*, 28 Ill. 264, 81 Am. Dec. 275; *Nixon v. Cobleigh*, 52 Ill. 387; *Doe v. Harter*, 1 Ind. 427; *Kelly v. Wiseman*, 14 La. Ann. 661; *Berry v. Riley*, 2 Barb. 307; *Smith v. McGowan*, 3 Barb. 404; *Stephens v. Baird*, 9 Cow. 274; *Hollowell v. Skinner*, 4 Ired. 165; *Whitaker v. Petway*, 4 Ired. 182; *Tomb's Appeal*, 9 Pa. St. 61; *Commonwealth v. Lelar*, 13 Pa. St. 22; *Riland v. Eckert*, 23 Pa. St. 215; *State v. Yongue*, 6 Rich. 323; *Meeker v. Wilson*, 1 Gall. 419; *Nagle v. Macy*, 9 Cal. 426.

<sup>143</sup> *Luton v. Sharp*, 94 Mich. 202.

<sup>144</sup> *Tullis v. Brawley*, 8 Minn. 277; *Crow v. Hudson*, 21 Ala. 561; *Kendall v. White*, 13 Me. 245; *Rex v. Elkins*, 4 Burr. 2129; *Caldwells v. Harlan*, 3 T. B. Mon. 350; *Paxson's Appeal*, 49 Pa. St. 195; *Bank v. Pullen*, 4 Dev. 297; *Dutton v. Tracy*, 4 Conn. 79; *Russell v. Gray*, 11 Barb. 541; *Henderson v. Cairns*, 14 Barb. 15; *Goodall v. Stuart*, 2 Hen. & M. 105; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Tucker v. Bond*, 23 Ark. 268; *Hathaway v. Goodrich*, 5 Vt. 65; *Loftin v. Hugins*, 2 Dev. 10; *Cornell v. Cook*, 7 Cow. 310; *Browning v. Hanford*, 7 Hill, 120; *Avril v. Warwick*, 3 Nev. & M. 871; *Butler v. State*, 20 Ind. 169; *Gyfford v. Woodgate*, 11 East, 299; *Richards v. Ladd*, 6 Saw. 40.

The reason why the return of an officer is not conclusive on strangers, where their rights are sought to be prejudiced by it, is because, in case it is false, they have no remedy by action against the officer, nor have they any right to control, amend, or vacate the return. The purchaser under an execution is not bound by the return,<sup>145</sup> nor dependent on it for title.<sup>146</sup> But persons may be so in privity with the parties as to be bound by the return. This is the case with the bail of the defendant when an execution has issued against his person, and with other persons occupying similar relations toward one of the parties.<sup>147</sup>

The effect of sheriffs' returns is well stated in the following quotations from opinions of the highest courts of Ohio and New Hampshire: "Notwithstanding some decisions, the weight of authority clearly is, that an official return, duly made upon process by a sworn officer, in relation to facts which it is his duty to state in it, is, as between the parties and privies to the suit, and others whose rights are necessarily dependent upon it, conclusive as to the facts stated therein, until vacated or set aside by due course of law; and that, as to all other persons, such return is prima facie evidence only of the facts stated in it, and subject to be disproved. (Cowen & Hill's Notes to Phillips on Evidence, Nos. 383-385; Gwynne on Sheriffs, 473 et seq., and cases cited; Hill v. Kling, 4 Ohio, 137; Angier v. Ash, 26 N. H. 105; Diller v. Roberts, 13 Serg. & R. 60, 15 Am. Dec. 578; Bott v. Burnell, 11 Mass. 165; Whitaker v. Sumner, 7 Pick. 555, 19 Am. Dec. 298; Barrett

<sup>145</sup> Wyatt v. Stewart, 34 Ala. 716; Moore v. Martin, 38 Cal. 428.

<sup>146</sup> § 341.

<sup>147</sup> McArthur v. Pease, 46 Barb. 423; Cozine v. Walter, 55 N. Y. 304; Bradley v. Bishop, 7 Wend. 852; Collins v. Cook, 4 Day, 1; Remington v. Henry, 6 Blackf. 63.

v. Copeland, 18 Vt. 69, 44 Am. Dec. 362; Wilson v. Executor of Hurst, 1 Pet. C. C. 441; Bruce v. Holden, 21 Pick. 189, 190; Loft. 372.) It is said in some of the elementary treatises that parties and privies are concluded by such return; but a careful consideration of the cases, as well as the reason of the rule, will confine it to those whose privity is such as entitle them to have the return set aside, or to maintain an action against the officer for a false return. And, upon principle, certainly, none others should be concluded by it. In *Witherill v. Goss and Delano*, 26 Vt. 750, Isham, J., in considering this rule, remarks: 'The true principle governing the case, we apprehend, is this: Wherever there is sufficient privity to enable a party to sustain an action against an officer for a false return, that return is conclusive in the proceedings under which it was made, and the party injured was driven to his action against the officer; but as to third persons, where no such privity exists, and no such action can be sustained, the return is not conclusive.' " <sup>148</sup> "The greater portion of the authorities may be reconciled with each other; and the general principle which seems to be fairly deducible from them is, that between the parties to the suit, and those claiming under them as privies, and all others whose rights and liabilities are dependent upon the suit as bail and indorsers, the return of the sheriff, of matters material to be returned, is so far conclusive evidence that it cannot be contradicted for the purpose of invalidating the sheriff's proceedings, or defeating any right acquired under them. But such return is not conclusive as to third persons whose interests are not connected with the suit, but may be affected by the proceedings of the sheriff, nor as to col-

<sup>148</sup> *Phillips v. Elwell*, 14 Ohio St. 244, 84 Am. Dec. 373.

lateral facts, or matters not necessary or proper to be returned. Should the sheriff return that the property attached was at the time the property of the debtor, this would not preclude a third person from showing a good title to it for both reasons.”<sup>149</sup> Where there is a question whether a purchase of property was made before or after the levy of a writ, the purchaser is not concluded by the officer’s return, but may prove in opposition thereto that the levy was made at a later hour than stated in such return.<sup>150</sup> In an action against a purchaser at an execution sale for the amount of his bid, the officer’s return is *prima facie* evidence only.<sup>151</sup> In Pennsylvania, however, the return is conclusive as between different judgment creditors, for the purpose of determining their respective priorities.<sup>152</sup>

Though a return be deemed conclusive, this does not exclude a party against whom it is offered from showing that, as offered, it differs from the return as actually made by the officer, and that an alteration has been made therein, which, when made, was unauthorized. Thus, where, as in Pennsylvania, an officer is without authority after returning his writ to “add to, or subtract from, it without leave of the court,” an act of his, without such leave, by inserting additional matter in the return, is unavailing. “The fraudulent alteration is no part of the instrument or of the record, and, upon this principle, the words added to the return are no part of it, and may be excluded.”<sup>153</sup>

<sup>149</sup> *Brown v. Davis*, 9 N. H. 82; *Claggett v. Richards*, 45 N. H. 363.

<sup>150</sup> *Nall v. Granger*, 8 Mich. 450, 77 Am. Dec. 462.

<sup>151</sup> *Fife v. Bohlen*, 22 Fed. Rep. 878.

<sup>152</sup> *Mentz v. Hamman*, 5 Whart. 150, 34 Am. Dec. 546; *Flick v. Troxsell*, 7 Watts & S. 65.

<sup>153</sup> *Henderson v. Henderson*, 133 Pa. St. 399, 19 Am. St. Rep. 650.

**§ 366. Return—Effect as Evidence for or Against the Officer.**—As against the officer who made it, a return, as long as it remains unvacated, is conclusive. He will not be permitted to contradict it, nor to show its falsity in any material respect.<sup>154</sup> The officer may, however, show any fact not inconsistent with his return. Hence, though he is estopped, in an action against him, from denying that the purchase price was paid,<sup>155</sup> yet he may, in a controversy between himself and the plaintiff, prove that the latter, being the purchaser, paid his bid, not in money, but by crediting the amount on the execution.<sup>156</sup> An officer may prove any facts outside of the return, and not inconsistent with it,<sup>157</sup> as that an erasure of the return was not made by him nor by his authority.<sup>158</sup> He may also show that property levied under a prior writ, as that of the defendant, was found to belong to a third person.<sup>159</sup>

<sup>154</sup> *Splahn v. Gillespie*, 48 Ind. 397; *Hill v. Kling*, 4 Ohio, 135; *Gardner v. Hosmer*, 6 Mass. 325; *Purrington v. Loring*, 7 Mass. 388; *McClelland v. Slingluff*, 7 Watts & S. 134, 42 Am. Dec. 224; *Butler v. State*, 20 Ind. 169; *Simmons v. Bradford*, 15 Mass. 82; *Johnson v. Stone*, 40 N. H. 197, 77 Am. Dec. 706; *Sheldon v. Payne*, 7 N. Y. 453; *Sutton v. Allison*, 2 Jones, 339; *Baker v. McDuffie*, 23 Wend. 289; *Heffner v. Reed*, 3 Grant Cas. 245; *Hustick v. Allen*, Coxe, 168; *Blue v. Commonwealth*, 2 J. J. Marsh. 26; *Williams v. Cheesebrough*, 4 Conn. 356; *Shewel v. Fell*, 3 Yeates, 17; *Commonwealth v. Fuqua*, 3 Litt. 41; *Lawson v. Main*, 4 Ark. 184; *Henry v. Stone*, 2 Rand. 455; *Welsh v. Bell*, 32 Pa. St. 12; *Woodgate v. Knatchbull*, 2 T. R. 155; *Whitrong v. Blaney*, 2 Mod. 10; *Paxton v. Steckel*, 2 Pa. St. 93; *Field v. Smith*, 2 Mees. & W. 388; *Rex v. Elkins*, 4 Burr. 2129; *Palmer v. Clarke*, 2 Dev. 354, 21 Am. Dec. 340. An officer's return is also conclusive upon his sureties in an action upon his bond. *Bishop v. Poundstone*, 11 Colo. App. 73.

<sup>155</sup> *Ferguson v. Tutt*, 8 Kan. 370; *Tiffany v. Johnson*, 27 Miss. 227; *Townsend v. Olin*, 5 Wend. 207.

<sup>156</sup> *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83; *Langdon v. Summers*, 10 Ohio St. 77.

<sup>157</sup> *Evans v. Davis*, 3 B. Mon. 344.

<sup>158</sup> *Meredith v. Shewall*, 1 Penr. & W. 495.

<sup>159</sup> *Fuller v. Holden*, 4 Mass. 498; *Learned v. Bryant*, 13 Mass. 224; *Tyler v. Ulmer*, 12 Mass. 163; *Remmett v. Lawrence*, 15 Q. B.

While a return is final as against an officer, the rule is very different when it is sought to be used in his favor. Generally, however, a return may properly be received in evidence in favor of the officer. It is, in his behalf, *prima facie*, but not conclusive.<sup>160</sup> In some of the states the return is conclusive in favor of the officer and against a party to the suit, except in an action against him for a false return. Hence, he cannot in such states be amerced on motion, when his return shows on its face that he has not been guilty of any neglect or misconduct.<sup>161</sup> The better rule is, that an action for a false return is not the exclusive remedy when an officer has been guilty of a breach of official duty. He may be proceeded against in any other form of action in which such breach of duty is alleged as a ground for damages or a cause for relief; and while his return may be received as evidence in his favor, the plaintiff is at liberty to controvert it, if he can.<sup>162</sup> The return is *prima facie* evidence in the sheriff's favor in any action he may prosecute against a stranger to the original action, as where he sues the purchaser for the amount of his bid,<sup>163</sup> or a third person to recover chat-

1004; 14 Jur. 1067; 20 L. J. Q. B. 25; see *Forster v. Cookson*, 1 Q. B. 419; *Decker v. Armstrong*, 87 Mo. 316.

<sup>160</sup> *Sanborn v. Baker*, 1 Allen, 526; *Baylor v. Scott*, 2 Port. 315; *Smith v. Emerson*, 43 Pa. St. 456; *Barrett v. Copeland*, 18 Vt. 67, 44 Am. Dec. 362; *Splahn v. Gillespie*, 48 Ind. 397; *Bechstein v. Sammis*, 17 N. Y. Sup. Ct. 585; *Baker v. Bucher*, 100 Cal. 214; *Crouse v. Bailey*, 10 N. Y. Supp. 273.

<sup>161</sup> *Bank of Gallipolis v. Domigan*, 12 Ohio, 220, 40 Am. Dec. 475; *Boone County v. Lowry*, 9 Mo. 23, 43 Am. Dec. 532; *Egery v. Buchanan*, 5 Cal. 54.

<sup>162</sup> *Whithead v. Keyes*, 3 Allen, 495; *Joyner v. Miller*, 55 Miss. 208; *Adey v. Bridges*, 2 Stark. 189; *Jackson v. Hill*, 10 Ad. & El. 492; *Barrett v. Copeland*, 18 Vt. 67, 44 Am. Dec. 362; *Waymire v. State*, 80 Ind. 67.

<sup>163</sup> *Hand v. Grant*, 5 Smedes & M. 508, 43 Am. Dec. 528; *Nichol v. Ridley*, 5 Yerg. 63, 26 Am. Dec. 254.

tels which had been levied upon.<sup>164</sup> Whenever an action is brought against an officer for a false return, this is considered as a direct attack upon the return, and the person prosecuting the attack is never estopped from showing that the return is false.<sup>165</sup> In such a proceeding the return is, however, *prima facie* evidence of its own truthfulness. Some evidence must be adduced to support the allegation of falsity. Slight evidence may be accepted as sufficient to establish a *prima facie* case against the officer.<sup>166</sup> In some instances, it has been held that apologetical matters recited in a return are not thereby established, even *prima facie*, in favor of the officer.<sup>167</sup>

§ 367. How a Return may be Compelled.—In England, an officer failing to return an execution in due time can be compelled to do so by obtaining a special rule of court requiring the return to be made; and then by proceeding against him by attachment and amercement, in case of his noncompliance with the rule.<sup>168</sup> The defendant may be interested in having a writ returned. Hence, he, as well as the plaintiff, may

<sup>164</sup> *Nichols v. Patton*, 18 Me. 231, 36 Am. Dec. 713; *Chadbourne v. Sumner*, 16 N. H. 129, 41 Am. Dec. 720.

<sup>165</sup> *Chamberlin v. Brewer*, 3 Bush, 561; *Andrew v. Parker*, 6 Blackf. 461; *Barrett v. Copeland*, 18 Vt. 67, 44 Am. Dec. 362; *Briggs v. Green*, 33 Vt. 565. The same rule prevails in actions against sheriffs for permitting an escape. *Whithead v. Keyes*, 3 Allen, 495.

<sup>166</sup> 2 Greenl. Ev., § 592.

<sup>167</sup> *Holderman v. Brasfield*, Litt. Sel. Cas. 271. But we think this case is in opposition to the true principle, and to the weight of the authorities on the subject. *Browning v. Hanford*, 7 Hill, 120; 2 Greenl. Ev., § 585.

<sup>168</sup> *Impey on Sheriffs*, §§ 89-91; *Rex v. Sheriff of Shropshire*, 9 Jur. 12; *Howitt v. Rickaby*, 9 Mees. & W. 52; 1 Dowl., N. S., 389; *Rex v. Sheriff of London*, 1 Taunt. 489; *Rex v. Sheriff of Middlesex*, 1 H. Black. 543; *Pardee v. Robertson*, 6 Hill, 550; *Morland v. Leigh*, 1 Stark. 388.



proceed against a negligent officer by rule and attachment.<sup>169</sup> In the United States, proceedings against officers by rule and attachment have been resorted to with less frequency than in England. The more usual remedy here is to bring an action or motion against the sheriff, to recover damages from him for not returning the writ. But returns are, in this country, sometimes compelled by attachment.<sup>170</sup> An officer is amenable to attachment for not returning a writ which was never in his possession, but was received by his deputy,<sup>171</sup> unless the motion against him is made many years after the death of the deputy.<sup>172</sup> If a writ is sent to a foreign country, the court out of which it issued has the power to compel its return.<sup>173</sup> Courts will compel the return of executions, although by lapse of time the right of action against the officer for the damages resulting from the nonreturn has been barred.<sup>174</sup>

**§ 368. Liability of Officers for not Returning Executions.**—It is the duty of the officer to return every execution delivered to him for service. This duty was, as we have shown in the preceding section, enforced by attachment. The remedy by attachment was deemed so adequate that, in England, no other seems to have been allowed to the plaintiff, and he was denied the right to sue for and recover damages for the non-

<sup>169</sup> *Edmonds v. Watson*, 7 Taunt. 5; 2 Marsh. 330; *France v. Clarkson*, 2 Dowl. P. C. 532; *Richardson v. Trundle*, 8 Com. B., N. S., 474, 7 Jur., N. S., 28; 29 L. J. Com. P. 310. For a case involving the right of a defendant to compel the return of a *ca. sa.*, see *Williams v. Webb*, 2 Dowl., N. S., 904; 5 Scott N. R. 901; 7 Jur. 155.

<sup>170</sup> *Wilson v. Wright*, 9 How. Pr. 459; 4 Walt's Pr. 25.

<sup>171</sup> *Van Tassel v. Van Tassel*, 31 Barb. 439; *People v. Brown*, 6 Cow. 41, overruling *People v. Waters*, 1 Johns. Cas. 137.

<sup>172</sup> *People v. Gilleland*, 7 Johns. 555.

<sup>173</sup> *Shindler v. Blunt*, 1 Sandf. 683.

<sup>174</sup> *People v. Everest*, 4 Hill, 71.

return of his writ.<sup>175</sup> Hence, in some of the United States, decisions have been made affirming that the plaintiff could sustain no action against the officer until he had exhausted his remedy by attachment, or had at least taken some steps tending to compel the making of the return.<sup>176</sup> But this view is certainly not in accord with the great majority of the American decisions on the subject. The duty of the officer is to return the writ at a particular time, whether ruled to do so or not. The fact that the plaintiff had made some ineffectual attempt to compel the discharge of the officer's duty would tend to show intentional neglect, and make the conduct of the officer appear more inexcusable than if no such attempt had been made. But certainly the absence of the attempted coercion on the part of the plaintiff ought not to justify the omission of an unmistakable duty on the part of the officer. The fact that the writ came to the officer's hands but a short time before the return day does not relieve him from the duty of returning it, nor from the penalties imposed by law for not making a return.<sup>177</sup>

In the United States, many statutes have been enacted for the purpose of giving ample, and in most cases summary and punitive, redress against officers neglecting or refusing to return final process. Independent of these statutory provisions, the right of a plaintiff to maintain an action against an officer and his sureties, for a failure to make a return, has been generally conceded.<sup>178</sup> The misconduct of the officer

<sup>175</sup> *Pardee v. Robertson*, 6 Hill, 550; *Commonwealth v. McCoy*, 8 Watts, 153, 34 Am. Dec. 445, and the authorities there cited.

<sup>176</sup> *Commonwealth v. Magee*, 8 Pa. St. 240, 49 Am. Dec. 509.

<sup>177</sup> *Chaffin v. Stuart*, 1 Baxt. 296.

<sup>178</sup> *Hawkins v. Commonwealth*, 1 T. B. Mon. 144; *White v. Wilcox*, 1 Conn. 347; *Burk v. Campbell*, 15 Johns. 456; *McGregor v.*

may have, in fact, occasioned no injury to the plaintiff; but the latter is, nevertheless, entitled to recover at least nominal damages in all cases where the officer does not show a valid excuse for not making his return.<sup>179</sup> Thus, a failure to return within proper time an execution issued against a county, renders an officer liable to the plaintiff for nominal damages without reference to the question whether or not there was any property out of which he could have made the money on the writ.<sup>180</sup>

An officer may successfully defend an action against him for not returning an execution, by showing that the nonreturn resulted from the act or instructions of the plaintiff,<sup>181</sup> or was ratified or waived by him,<sup>182</sup> or that the writ or the judgment on which it issued was void.<sup>183</sup> But it is no defense that the writ was irregular, where the irregularity is not such as to render it void.<sup>184</sup> A sheriff cannot plead as a defense his igno-

Brown, 5 Pick. 170; Keith v. Commonwealth, 5 J. J. Marsh. 359; Ronald v. Bentley, 4 Hen. & M. 461; Runlett v. Bell, 5 N. H. 433.

<sup>179</sup> Lafin v. Willard, 16 Pick. 64, 26 Am. Dec. 629; Governor v. Baker, 14 Ala. 652; Kidder v. Baker, 18 Vt. 454; Goodnow v. Willard, 5 Met. 517.

<sup>180</sup> State v. Buckles, 8 Ind. App. 228, 52 Am. St. Rep. 476.

<sup>181</sup> Robertson v. Coker, 11 Ala. 466; Kennedy v. Smith, 7 Yerg. 472; Robinson v. Harrison, 7 Humph. 189; Granberry v. Crosby, 7 Heisk. 579; Shannon v. Clark, 3 Dana, 152; Norris v. State, 22 Ark. 524.

<sup>182</sup> McKinley v. Tuckle, 6 Lans. 214.

<sup>183</sup> Shute v. McRea, 9 Ala. 931; Hill v. Wait, 5 Vt. 124; Graham v. Chandler, 15 Ala. 342; Bowen v. Jones, 13 Ired. 25, 55 Am. Dec. 426.

<sup>184</sup> McRae v. Colclough, 2 Ala. 74; Bondurant v. Woods, 1 Ala. 543; Hawkins v. Taylor, 56 Ark. 45, 35 Am. St. Rep. 82; Jones v. Goodbar, 60 Ark. 182; Stevenson v. McLeod, 5 Humph. 322, 42 Am. Dec. 434. That the judgment was paid has been held to be a sufficient excuse for not returning a writ. Evans v. Boggs, 2 Watts & S. 229. In some of the states, a difference is recognized between proceedings against an officer for failure to return an execution

rance or mistake of law,<sup>185</sup> nor excuse his failure to return in due time upon the ground that the debtors claimed to have defenses against the execution.<sup>186</sup> If a sheriff receives an execution directed against himself, he must properly return it.<sup>187</sup> The failure to return within the proper time fixes the liability of the officer, which cannot be discharged by a tender of the amount due.<sup>188</sup> That the execution was returned in a few days after the proper time is no defense.<sup>189</sup> An actual return within the allowed period is requisite, the mere indorsement of a return within the period being alone insufficient.<sup>190</sup> The officer may have no perfect defense to the action, and yet various facts may be given in evidence, for the purpose of mitigating the damages. It was at one time held in New York that the officer might, in mitigation of damages, show that the defendant was still solvent, and that the plaintiff might, by taking out a new writ, collect the full amount of his debt.<sup>191</sup> If this defense is permissible, it may be pleaded to each of several consecutive writs, and the plaintiff thus kept out of his money for an intermin-

within due time, and when he is usually liable to a penalty, and other actions and proceedings against him not of a penal or summary character. As to those summary proceedings, it has been held that he may shield himself therefrom by showing an irregularity in the execution, as where there was a material variance between it and the judgment upon which it issued. *Fisher v. Franklin*, 38 Kan. 251; *Fuller v. Wells*, 42 Kan. 551.

<sup>185</sup> *Boyd v. Teague*, 111 N. C. 246; *Turner v. Page*, 111 N. C. 291; *Cowan v. Sloan*, 95 Tenn. 424.

<sup>186</sup> *Cowan v. Sloan*, 95 Tenn. 424.

<sup>187</sup> *Kinzer v. Helm*, 7 Heisk. 672.

<sup>188</sup> *Chaffin v. Crutcher*, 2 Sneed, 359.

<sup>189</sup> *Brookfield v. Remsen*, 1 Abb. App. 210; 4 Tr. App. 278; *Peck v. Hurlburt*, 46 Barb. 559.

<sup>190</sup> *Wilson v. Young*, 58 Ark. 593.

<sup>191</sup> *Stevens v. Rowe*, 3 Denio, 327, overruled in *Ledyard v. Jones*, 7 N. Y. 550.

able period. But the better opinion is, that an officer who fails to return an execution becomes, in the absence of statutory provisions to the contrary, at once <sup>192</sup> *prima facie* liable to the plaintiff for the full amount collectible under the writ; <sup>193</sup> and that he can diminish the amount of his liability, not by showing that the writ can still be executed, but only by proving that, from the insolvency of the defendant, or from some other sufficient cause, the writ could not be satisfied, and, therefore, that its nonreturn did not damage the plaintiff to the amount of the writ.<sup>194</sup> In Arkansas, a different penalty attaches to a total failure to return an execution from that which attaches to a failure to make a return within the statutory time, though such return is made before proceedings are instituted against the officer.<sup>195</sup> In Iowa, the statute does not, in direct terms, provide that an officer shall be liable to an action for the mere failure to return a writ. Hence, the courts of that state have concluded that the mere failure to return is not of itself a cause of action. Some detriment must have resulted therefrom. It must appear that the plaintiff was either prevented or

<sup>192</sup> *Chaffin v. Crutcher*, 2 Sneed, 360.

<sup>193</sup> *Roth v. Duvall*, 1 Idaho, 149; *People v. Roper*, 4 Scam. 560; *People v. Nichols*, 4 Scam. 560.

<sup>194</sup> *Bank of Rome v. Curtiss*, 1 Hill, 275; *Pardee v. Robertson*, 6 Hill, 550; *Weld v. Bartlett*, 10 Mass. 470; *Ledyard v. Jones*, 7 N. Y. 550; *Swezey v. Lott*, 21 N. Y. 481, 78 Am. Dec. 160; *Brookfield v. Remsen*, 1 Abb. App. 210; 4 Tr. App. 278; *Taylor v. Hancock*, 19 La. Ann. 406; *Bowman v. Cornell*, 39 Barb. 69; *People v. Lott*, 21 Barb. 130. But, while this defense is allowed a sheriff under the New York statutes, it is denied to a constable whose liability is absolutely fixed by the fact of his failure to return an execution within the time fixed by statute. *Rutzkowski v. George*, 92 Hun. 412.

<sup>195</sup> *Hawkins v. Taylor*, 56 Ark. 45, 35 Am. St. Rep. 82. See, also, *Piedmont M. Co. v. Burton*, 105 N. C. 74.

delayed in the collection of his debt.<sup>196</sup> In Nebraska, notwithstanding the statute declares that when an officer refuses or neglects to return an execution he "shall, on motion in court, be amerced in the amount of the debt, damages, and costs, with ten per centum thereon," he is answerable only for the actual damages sustained by the plaintiff.<sup>197</sup> Such, also, seems to be the law in West Virginia<sup>198</sup> and Vermont.<sup>199</sup> For failure to return a venditioni exponas, the liability of the officer cannot exceed the value of the property directed to be sold.<sup>200</sup>

In many of the states, the liability of an officer for not returning an execution is fixed by statutes. These statutes are very harsh in their terms, and are manifestly intended to be so stringent that no officer will be tempted to neglect this official duty. Some of them impose upon the officer a mere penalty, while others add to this penalty the amount of the judgment and costs. Where this is the case, the fact that the plaintiff has not been injured by the official neglect can neither be received in evidence in justification, nor in mitigation of damages.<sup>201</sup> In most of these states, the proceedings

<sup>196</sup> *Musser v. Maynard*, 55 Iowa, 197.

<sup>197</sup> *Crooker v. Melick*, 18 Neb. 227. A similar statute is similarly construed in South Dakota. *Swenson v. Christoferson*, 10 S. D. 188, 65 Am. St. Rep. 712.

<sup>198</sup> *Exchange Bank v. Horner*, 26 W. Va. 442.

<sup>199</sup> *Fletcher v. Bradley*, 12 Vt. 22, 36 Am. Dec. 324.

<sup>200</sup> *Johnston v. Gwathney*, 2 Bibb, 186.

<sup>201</sup> In Alabama, the officer is liable, by way of penalty, for twenty per cent of the amount of the writ. *Noble v. Whetstone*, 45 Ala. 361. In Arkansas and Missouri, he must pay the whole sum due to plaintiff. *Atkinson v. Heer*, 44 Ark. 174; *Norris v. State*, 22 Ark. 524; *Milburn v. State*, 11 Mo. 188, 47 Am. Dec. 148. The Indian Territory statute is that of Arkansas. *Grubbs v. Needles*, 70 Fed. Rep. 199. The statutes of Kentucky also impose a penalty on the officer. *Deposit Bank v. Glenn*, 1 Met. (Ky.) 585. He may defend himself by showing a reasonable excuse, such as that the writ was

for the enforcement of the officer's liability are of a summary character. No new or independent action need be commenced. A motion may be made in the suit in which the execution issued, and a judgment obtained therein against the officer and his sureties, for the penalty prescribed by statute.<sup>202</sup> A statutory pen-

accidentally mislaid or lost. *Waring v. Thomas*, 1 Litt. 254; *Shippen v. Curry*, 3 Met. (Ky.) 184; *Mitcheson v. Foster*, 3 Met. (Ky.) 324. Failing to return the writ for thirty days after the return day, or to show a sufficient excuse for not doing so, he becomes liable for the full amount of the execution, and thirty per cent damages. *Keith v. Commonwealth*, 5 J. J. Marsh. 359; *Flourney v. Rubey*, 5 J. J. Marsh. 322. In Louisiana and New Jersey, officers are liable for the full amount of the writ, unless they show a sufficient excuse for not returning it. *Magee v. Robins*, 2 La. Ann. 411; *Gasquet v. Robins*, 2 La. Ann. 407; *Webb v. Kemp*, 2 La. Ann. 370; *Lay v. Boyce*, 3 La. Ann. 622; *James v. Thompson*, 12 La. Ann. 174; *Ritter v. Merseles*, 4 Zab. 627; *Stryker v. Mersells*, 4 Zab. 542. In Ohio, the officer, for failing to return the writ, may be amerced in the amount of the debt, damages, and costs, with ten per cent added thereto. *Glaucque's Rev. Oh. Sts.*, 7th ed., § 5594; *Graham v. Newton*, 12 Ohio, 210; *Moore v. McClief*, 16 Ohio St. 50. The party prosecuting the officer "must bring himself both within the letter and the spirit of the law"; and the courts seem to seek for excuses for relieving officers from the harsh provisions of the statute. *Moore v. McClief*, 16 Ohio St. 50; *Duncan v. Drakely*, 10 Ohio, 47; *Webb v. Anspach*, 3 Ohio St. 522; *Conkling v. Parker*, 10 Ohio St. 28; *Langdon v. Summers*, 10 Ohio St. 77. In Pennsylvania, an officer "neglecting to make return of his execution, on or before the return day thereof, is absolutely fixed for the debt and cost," unless he can show sufficient cause for the delay. *Bachman v. Fenstermacher*, 112 Pa. St. 335. In Tennessee, the insolvency of the defendant does not mitigate the damages which may be recovered for the failure to make due return of a writ. *Webb v. Armstrong*, 5 Humph. 379; *Fowler v. McDaniel*, 6 Heisk. 529. If, after receiving the writ, and before its return day, the officer's official term expires, and he has made no levy, he has in Tennessee no power to return the writ, and cannot be proceeded against in a summary manner, on account of its nonreturn. *Fondrin v. Planters' Bank*, 7 Humph. 447; *Neil v. Beaumont*, 3 Head, 556; *State v. Parchmen*, 3 Head, 609.

<sup>202</sup> *Noble v. Whetstone*, 45 Ala. 361; *Chaffin v. Crutcher*, 2 Sneed, 360; *Winfield v. Crosby*, 5 Cold. 241; *Earl v. Smith*, 26 Tex. 522; *Bank of Louisville v. Hurt*, 8 Bush, 633; *Dunn v. Newman*, 7 How. (Miss.) 582; *Benson v. Porter*, Meigs, 519; *Hand v. State*, 5 Humph. 515; *Morehead v. Halliday*, 1 Smedes & M. 625.

alty cannot be increased by an amendment of the judgment and execution, made after the return day of the execution and after the officer has incurred the penalty by a failure to return.<sup>203</sup> Statutes of this class are regarded as highly penal, and should receive a strict construction.<sup>204</sup> One who proceeds against an officer for amercement under such a statute must strictly observe its requirements and bring himself within its terms.<sup>205</sup> The penalty imposed may be recovered only from the officer or officers named in the statute, though there may be officers not named therein who are empowered to execute and return process.<sup>206</sup> An action against an officer and his sureties for the statutory penalty is regarded, in Arkansas, as *ex contractu*, and, therefore, upon the officer's death, as surviving against his personal representatives.<sup>207</sup>

§ 369. **Actions for False Returns.**—No doubt officers are liable for false returns;<sup>208</sup> and that, in the absence of statutes providing a different remedy, this liability must be enforced by a new suit directed against the officer, and not in the one in which the writ issued.<sup>209</sup> The return must be false in point of fact, and not in opinions, or legal inferences drawn from correctly stated

<sup>203</sup> *Jones v. Goodbar*, 60 Ark. 182.

<sup>204</sup> *Hawkins v. Taylor*, 56 Ark. 45, 35 Am. St. Rep. 82; *Rutzkowski v. George*, 92 Hun, 412.

<sup>205</sup> *Fuller v. Wells*, 42 Kan. 551; *Fisher v. Franklin*, 38 Kan. 251; *Duncan v. Drakeley*, 10 Ohio, 45; *Moore v. McClell*, 16 Ohio St. 51.

<sup>206</sup> *Nixon v. Fithian*, 61 N. J. L. 4.

<sup>207</sup> *Wilson v. Young*, 58 Ark. 593. But we regard this conclusion as of very doubtful correctness. See dissenting opinion to the case cited.

<sup>208</sup> *Tomlison v. Long*, 8 Jones, 469; *Lemit v. Freeman*, 7 Ired. 317; *Estabrook v. Hapgood*, 10 Mass. 318; *Remick v. Wentworth*, 89 Me. 392.

<sup>209</sup> *Goubot v. De Crouy*, 2 Dowl. P. O. 86; 1 Car. & M. 772; 3 Tyrw. 906.



facts.<sup>210</sup> The officer cannot successfully defend himself by showing that the falsity of his return was occasioned by ignorance,<sup>211</sup> or mistake,<sup>212</sup> or that a prior writ in his hands was also returned nulla bona.<sup>213</sup> His return must conform to the facts, even though a misstatement might tend to better secure the rights of the parties.<sup>214</sup> A return of nulla bona is made at the officer's risk, but he should be permitted to show, when proceeded against for a false return of nulla bona, that a levy which he had made and abandoned was of goods belonging to a stranger, and hence, that his return was good.<sup>215</sup> He may attack the judgment on which the writ issued, for the purpose of showing that it was void;<sup>216</sup> and, in England, he may probably defend himself by showing that the judgment was fraudulent.<sup>217</sup> The plaintiff's cause of action may be defeated by showing that the return was made at his instance, or approved by him at a time when he was conversant with all the facts of the case.<sup>218</sup>

A false return is certainly more culpable on the part of the officer, and more injurious to the parties to the suit, than is the omission to make any return whatever. No reason exists why the liability of an officer for a false return ought not to be at least as great as his lia-

<sup>210</sup> *Lemit v. Mooring*, 8 Ired. 312.

<sup>211</sup> *Houser v. Hampton*, 7 Ired. 333.

<sup>212</sup> *Clarke v. Gary*, 11 Ala. 98; *Albright v. Tapscott*, 8 Jones, 473.

<sup>213</sup> *Towne v. Crowder*, 2 Car. & P. 355.

<sup>214</sup> *State v. Harrington*, 28 Mo. App. 287.

<sup>215</sup> *Dornin v. McCandless*, 146 Pa. St. 344, 28 Am. St. Rep. 798.

<sup>216</sup> *Tyler v. Duke of Leeds*, 2 Stark. 218; *McDonald v. Bunn*, 3 Denio. 45.

<sup>217</sup> *Penn v. Scholey*, 5 Esp. 243; *Harrod v. Benton*, 8 Barn. & C. 217.

<sup>218</sup> *Hayes v. Lusby*, 5 Har. & J. 485; *Stuart v. Whitaker*, 2 Car. & P. 100.

bility for a failure to make any return. Hence, we think that the principles maintained by the authorities cited in the preceding section, determining the measure of damages in actions for neglect to return writs, ought to be applied to actions for false returns. The decisions concerning the measure of damages in proceedings for false returns are so infrequent that no general rule can yet be regarded as well established. In Indiana, an officer was not permitted to show that the defendant was insolvent, and that, therefore, no damages could have accrued to plaintiff through the false return.<sup>219</sup> In Missouri, an officer who makes a false return is also answerable for the whole amount of money in the writ specified, "regardless of the real extent of the injury occasioned by such false return"; and he is not relieved from such liability by amending his return, and thereby purging it of its falsehood.<sup>220</sup> But, in Maine and in England, the party injured must show the extent of his injury, and no damages are awarded beyond what the plaintiff can prove that he has sustained.<sup>221</sup> If a return is made of *feri feci* as to part, and *nulla bona* as to the residue, a plaintiff who accepts the amount collected is not thereby estopped from maintaining an action based on the hypothesis that the *nulla bona* part of the return is false.<sup>222</sup> In an action

<sup>219</sup> *Stevens v. Beckes*, 3 Blackf. 88.

<sup>220</sup> *State v. Case*, 77 Mo. 247.

<sup>221</sup> *Levy v. Hale*, 29 L. J. C. P. 127; 1 L. T., N. S., 132; *Wyllie v. Birch*, 8 Gale & D. 629; 4 Q. B. 566; 12 L. J. Q. B. 260; *Nash v. Whitney*, 30 Me. 341; *Norton v. Valentine*, 15 Me. 36.

<sup>222</sup> *Holmes v. Clifton*, 10 Ad. & El. 673; 4 Perry & D. 112; 2 Perry & D. 556. But see *Benyon v. Garrat*, 1 Car. & P. 154, where it was held that a plaintiff, accepting the amount collected, after being warned that his action would be treated as a ratification of the return, was adjudged to be estopped from prosecuting his action. In some of the states, penalties for false returns, and the mode of en-

against an officer for a false return, his return may be impeached by parol evidence.<sup>223</sup> The right to proceed against an officer for a false return is waived by taking steps in affirmance of a sale made by him under the writ, as by filing a bill to redeem from the sale.<sup>224</sup>

forcing such penalties, are prescribed by statute. *Huffaker v. Greer*, 1 Cold. 160.

<sup>223</sup> *Craven v. Higginbotham*, 83 Ala. 429.

<sup>224</sup> *Horn v. Indianapolis N. B.*, 125 Ind. 381, 21 Am. St. Rep. 231.

## CHAPTER XXVII.

## PROCEEDINGS UNDER ELEGITS.

§ 370. Of proceedings under elegit.

§ 371. Of the effect of an extent under an elegit.

§ 370. Of Proceedings by Elegit.—Since the thirteenth year of the reign of Edward the First, the usual method, in England, of obtaining satisfaction out of the lands of defendants, has been by proceedings taken under the writ of elegit. This writ is, however, almost unknown in the United States. It has been employed in Virginia more frequently than elsewhere,<sup>1</sup> but has been recently abolished by the code of that state.<sup>2</sup> In Alabama and North Carolina, the writ seems to have been used.<sup>3</sup> So far as we can ascertain, it is now nowhere authorized in this country, save in Delaware, and is even there used only for special purposes, and to a limited extent. In the last-named state, it is authorized only when it appears by inquisition that the rents and profits of specified real estate will, in seven years, be sufficient to satisfy the plaintiff's judgment.<sup>4</sup> The fact that the elegit is so nearly unknown to American jurisprudence justifies us in giving it but a brief notice in this work. The first duty of a sheriff, on receiving

<sup>1</sup> *McCance v. Taylor*, 10 Gratt. 580; *Price v. Thrash*, 30 Gratt. 515; *Wilson v. Jackson's Admx.*, 5 Leigh, 102; *Stuart v. Hamilton's Exrs.*, 8 Leigh, 503.

<sup>2</sup> Code West Virginia, 1891, p. 886, § 2; Code Virginia, 1887, § 2581; *Hutcheson v. Grubbs*, 80 Va. 251.

<sup>3</sup> *Norris v. Ellis*, 8 Ala. 560; *Forrest v. Camp*, 16 Ala. 645; *Ricks v. Blount*, 4 Dev. 131.

<sup>4</sup> Rev. Code Del., 1893, p. 832; *Robinson v. Milby*, 2 Houst. 138.

this writ, was to summon a jury of twelve men.<sup>5</sup> This jury, when impaneled, was instructed to inquire what goods and chattels, excepting oxen and beasts of the plow, and also what lands and tenements, the defendant had in the bailiwick subject to the writ, and also what was a moiety of such lands and tenements.<sup>6</sup> The writ must be for the whole judgment, unless a part has been satisfied.<sup>7</sup> It did not sanction any interference with real estate until the personal property subject to the writ was exhausted. The jury first estimated the value of all the defendant's goods and chattels, save only his oxen and beasts of the plow. For this purpose they were authorized to visit the place occupied by the defendant and to inspect his property. The chattels valued by them were then delivered to the plaintiff at the amount of such valuation.<sup>8</sup> If this amount proved sufficient to satisfy the writ, no lands were taken.<sup>9</sup> If the amount proved insufficient, or if the defendant had no chattels subject to execution, then the jury determined what was a moiety in value of his lands and tenements in their bailiwick. The statute granting the elegit authorized the taking of a moiety of the defendant's land. The term "moiety," as there used, was never construed to sanction the extending of an undivided half, nor as compelling the taking of a half of each separate parcel. The jury was to take one-half in value, and to designate by metes and bounds the part taken,<sup>10</sup> and also specify with convenient certainty the

<sup>5</sup> Watson's Sheriff, 210; Impey's Sheriff, 145, 146; Bingham on Judgments and Executions, 239, 240.

<sup>6</sup> Watson's Sheriff, 210; Impey's Sheriff, 146; Bingham on Judgments and Executions, 239.

<sup>7</sup> Sherwood v. Clark, 15 Mees. & W. 764.

<sup>8</sup> Watson's Sheriff, 206, 207; Impey's Sheriff, 144, 146.

<sup>9</sup> Impey's Sheriff, 147.

<sup>10</sup> Watson's Sheriff, 211; Impey's Sheriff, 147; Sparrow v. Matter-

estate of the defendant therein.<sup>11</sup> If an extent is made of a house containing several rooms, the plaintiff must be awarded certain designated rooms, and not a moiety of the whole.<sup>12</sup> If the defendant had two manors, the plaintiff might be awarded one of them, if they were of equal value.<sup>13</sup> But all questions about the proper method of setting off moieties have become obsolete, for, by the statute of 1 and 2 Vict., chap. 110, sec. 11, plaintiffs are authorized to extend the whole instead of a part. If two elegits issued against the same defendant in favor of different plaintiffs, the sheriff extended a moiety under the writ having precedence, and a moiety of the remaining moiety under the second writ.<sup>14</sup> But if the same plaintiff sued out two elegits under judgments of the same term, he was entitled to a moiety under each.<sup>15</sup> After the inquisition was completed, the elegit was filed in the court whence it issued, with a return thereon showing the proceedings which had been taken under it.<sup>16</sup>

sock, Cro. Car. 319; Doug. 473. But it is not now necessary to describe by metes and bounds. A description which is sufficient in a conveyance is sufficient in a return of proceedings under an elegit. *Doe v. Parry*, 2 Dowl. & L. 430; 13 Mees. & W. 356; 8 Jur. 963; 14 L. J. Ex. 20; *Sherwood v. Clark*, 15 Mees. & W. 764.

<sup>11</sup> *Watson's Sheriff*, 210; *Bingham on Judgments and Executions*, 240.

<sup>12</sup> *Watson's Sheriff*, 211; *Fenny v. Durrant*, 1 Barn. & Ald. 42; *Pullen v. Purbeck*, Carth. 453; 12 Mod. 356.

<sup>13</sup> *Impey's Sheriff*, 147, 150; *Watson's Sheriff*, 211; *Denn v. Abingdon*, Doug. 473. But where the manors are in different *vills*, it is said that the plaintiff must have a moiety of each. *Impey's Sheriff*, 148.

<sup>14</sup> *Watson's Sheriff*, 212; *Impey's Sheriff*, 150; *Bingham on Judgments and Executions*, 241; *Hult v. Cogan*, Cro. Eliz. 483.

<sup>15</sup> *Watson's Sheriff*, 213; *Bingham on Judgments and Executions*, 241; *Attorney General v. Andrew*, Hardr. 23; *Morris v. Jones*, 3 Dowl. & R. 603; 2 Barn. & C. 24.

<sup>16</sup> *Bingham on Judgments and Executions*, 241; *Impey's Sheriff*, 146.

**§ 371. Of the Effect of an Extent under an Elegit.—**  
“A return of lands delivered on an elegit is a legal satisfaction of the judgment,<sup>17</sup> though the debtor’s interest in the land and in its income is set off to the creditor at a yearly value, to continue for a term of years, should the debtor so long live; and he, having only a life estate, die before the expiration of the term of years.”<sup>18</sup> It was at one time insisted that the mere award and acceptance of an elegit should be deemed a satisfaction of the judgment. But it has long been settled that satisfaction was produced, not by the award, but only by the return of lands delivered.<sup>19</sup> Hence, when an elegit is returned nihil,<sup>20</sup> or when it is returned partly satisfied by delivery of chattels, and nihil as to the residue, the plaintiff is entitled to further execution against the property or the person of the defendant. The sheriff cannot deliver to the creditor actual possession of the lands extended.<sup>21</sup> The latter must resort to ejectment.<sup>22</sup> The creditor’s title is subject to a prior equitable mortgage.<sup>23</sup> He is not entitled to rents accruing after the delivery of the elegit, but before the inquisition.<sup>24</sup> The creditor must account for the profits of the

<sup>17</sup> *Hinesly v. Hunn*, 5 Harr. 236; *Crawley v. Lidgeat*, Cro. Jac. 388; *Bingham on Judgments and Executions*, 176.

<sup>18</sup> *Freeman on Judgments*, § 474; *Blumfield’s Case*, 5 Rep. 87 a; *Pratt v. Jones*, 22 Vt. 341, 54 Am. Dec. 80; *Thomas v. Platts*, 43 N. H. 629.

<sup>19</sup> *Foster v. Jackson*, Hob. 57; *Glasscock v. Morgan*, 1 Lev. 92; 2 Ld. Raym. 1451; 12 Mod. 356; *Bingham on Judgments and Executions*, 176.

<sup>20</sup> *Knowles v. Palmer*, Cro. Eliz. 160.

<sup>21</sup> *Hesse v. Stevenson*, Bos. & Pull., 1 N. R. 133; *Bacon v. Peck*, 1 Strange, 226; *Impey’s Sheriff*, 144.

<sup>22</sup> *Watson’s Sheriff*, 218; *Impey’s Sheriff*, 148; *Bingham on Judgments and Executions*, 242.

<sup>23</sup> *Whitworth v. Gaugain*, 1 Phil. 728; 10 Jur. 531; 15 L. J. Ch. 433; *Legg v. Mathieson*, 2 Giff. 71; 6 Jur., N. S., 1010.

<sup>24</sup> *Sharp v. Key*, 8 Mees. & W. 379; 7 Dowl. P. C. 770.

lands, and is said not to be excused, although his occupation is interrupted by war.<sup>25</sup> As soon as the debt has been paid, either out of the rents and profits, or by any other means, the debtor is entitled to be restored to his lands.<sup>26</sup> For the purpose of determining whether this payment has been made, an account will be ordered to be taken.<sup>27</sup> During the continuance of the estate of the tenant by elegit, the debtor's interest in the land is not subject to extent under another writ.<sup>28</sup>

<sup>25</sup> Corbet's Case, 4 Rep. 82 b; 5 Rob. Pr. 663.

<sup>26</sup> Watson's Sheriff, 214.

<sup>27</sup> Price v. Varney, 5 Dowl. & R. 612; 3 Barn. & C. 733; Bull v. Faulkner, 1 De Gex & S. 685; 12 Jur. 83; 17 L. J. Ch. 23.

<sup>28</sup> Carter v. Hughes, 2 Hurl. & N. 714; 27 L. J. C. P. 225.



## CHAPTER XXVIII.

EXTENDING EXECUTIONS UNDER THE STATUTES OF  
CONNECTICUT, MAINE, MASSACHUSETTS,  
NEW HAMPSHIRE, AND VERMONT.

- § 372. Strict compliance with the statutes is required.
- § 373. What may be extended.
- § 374. Number and qualifications of the appraisers.
- § 375. Appraisers, how and by whom chosen.
- § 376. Appraisers, how sworn.
- § 377. Proceedings of the appraisers.
- § 378. Certificate of the appraisers.
- § 379. The extent must, unless for good cause shown, be by metes and bounds.
- § 380. The extent on lands of cotenants cannot be by metes and bounds.
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- § 382. Equities of redemption.
- § 383. The delivery of seisin to the creditor.
- § 384. The officer's return.
- § 385. The officer's return, what description of property is sufficient.
- § 386. Recording the writ and return.
- § 387. Of contradicting and supporting the record of the extent.
- § 388. Of amending the record.
- § 389. Redemption from the extent.
- § 390. The time to which the extent relates.
- § 391. The effect of the extent.

§ 372. Proceedings by Extent must Strictly Accord with the Statute.—In all of the New England states but Rhode Island, lands are not sold under execution, except that when the interest of the defendant is the right of redeeming mortgaged lands, it may, in some of these states, be either extended or sold at public auction;<sup>1</sup> and in Massachusetts, if the creditor prefers so to do, he may now sell his debtor's lands under execution

<sup>1</sup> Woodward v. Sartwell, 129 Mass. 213.

in all cases.<sup>2</sup> They are set off to the creditor in quantities sufficient to satisfy his writ, at their value as fixed by appraisers. We shall now treat of the procedure in these states by which the title of the defendant in execution is divested from him and vested in the plaintiff. The first peculiarity of which we shall speak is the strictness of proceeding exacted under this system. In states where lands are sold under execution, purchasers are very generally protected from any ill consequences arising from errors or omissions in the proceedings. The various acts which the sheriff is required by law to perform are not regarded as indispensable to the validity of his sale. He is responsible, in his official capacity, to parties injured by his errors or omissions. But the purchaser is not ordinarily prejudiced thereby. Under the system of extending lands under execution in the New England states, the rule is the reverse. Every requirement of the statute is regarded as indispensable. Presumptions in favor of the regularity of the proceedings are not indulged. All the various directions of the statute must affirmatively appear to have been complied with, or the proceedings are ineffectual, and the creditor derives no title whatever.<sup>3</sup> This makes it of special importance that all the various requisitions of the statute should be understood and remembered. The extent must always be made in the name of the plaintiff. If made in

<sup>2</sup> *Hackett v. Buck*, 128 Mass. 369.

<sup>3</sup> *Metcalf v. Gillet*, 5 Conn. 403; *Pierce v. Strickland*, 26 Me. 277; *Hobart v. Frisbie*, 5 Conn. 595; *Fitch v. Smith*, 9 Conn. 45; *Mitchell v. Kirtland*, 7 Conn. 231; *Leonard v. Bryant*, 2 Oush. 32; *Jewett v. Whitney*, 51 Me. 233; *Coe v. Wickham*, 33 Conn. 389; *Eddy v. Knap*, 2 Mass. 154; *Russell v. Dyer*, 40 N. H. 173; *Glidden v. Philbrick*, 56 Me. 222; *Ellison v. Wilson*, 36 Vt. 60; *Chenery v. Stevens*, 97 Mass. 77; *Pickering v. Reynolds*, 111 Mass. 83; *Benson v. Smith*, 42 Me. 414, 66 Am. Dec. 285; *Schroeder v. Tomlinson*, 79 Conn. 348.

the name of any other person, it is void, although he is in equity entitled to all the fruits of the judgment.<sup>4</sup> In Connecticut, it seems now to be settled that an extent is not valid unless it is shown by the record that the officer did not levy on the real estate until after he had first made due and unavailing inquiry for personal property.<sup>5</sup>

**§ 373. What may be Extended.**—We have, in a preceding chapter, considered the question, What real estate is subject to execution? Most of what was there said is applicable to an extent under the statutes of the New England states. In each of these states, the statute attempts to designate, with more or less particularity, the interests which may be taken. In Connecticut, the officer may, “by the direction of the creditor or his attorney, levy on the lands, tenements, or real estate of the debtor, holden in his own right.”<sup>6</sup> This statute has been held to authorize an extent upon an estate for 999 years,<sup>7</sup> an estate for life,<sup>8</sup> and an equity of redemption.<sup>9</sup> A levy upon an equity of redemption must purport to be such, and not assume to be a levy upon an unencumbered estate.<sup>10</sup> The right of a widow to have dower assigned to her out of the lands of her deceased husband cannot be taken under an extent.<sup>11</sup> In Maine, “real estate attachable, including the right to cut tim-

<sup>4</sup> *Mysroll v. Violet*, 55 Me. 108.

<sup>5</sup> *Botsford v. Beers*, 11 Conn. 369; *Coe v. Wickham*, 33 Conn. 389. Contra, *Spencer v. Champion*, 13 Conn. 11; *Eastman v. Curtis*, 4 Vt. 616.

<sup>6</sup> Gen. Stats. Conn. 1888, § 1182.

<sup>7</sup> *Mun v. Carington*, 2 Root, 15.

<sup>8</sup> *Wheeler v. Gorham*, 2 Root, 329.

<sup>9</sup> *Brown v. Punderson*, 1 Day, 93.

<sup>10</sup> *Scripture v. Johnson*, 3 Conn. 211.

<sup>11</sup> *Nason v. Allen*, 5 Me. 479; *Gooch v. Atkins*, 14 Mass. 322; *McMahon v. Gray*, 150 Mass. 289.

ber and grass, may be taken to satisfy an execution.”<sup>12</sup> “Estates-tail are to be taken, appraised, and held as estates in fee-simple.”<sup>13</sup> Provision is made for levies on estates for life,<sup>14</sup> estates under lease,<sup>15</sup> lands fraudulently conveyed,<sup>16</sup> and on lands mortgaged.<sup>17</sup> Real estate which never stood in the debtor’s name, but which he has purchased, and with intent to defraud his creditors has had conveyed to another, to be held for him, cannot be reached without calling in aid the powers of courts of equity.<sup>18</sup> A husband’s interest in the lands of his wife may be taken.<sup>19</sup> Neither the estate of a mortgagee,<sup>20</sup> the right of a grantor to re-enter for breach of a covenant,<sup>21</sup> nor the interest of a creditor under an extent, before the time for redemption has expired,<sup>22</sup> can be taken. Lands of which the defendant is disseised are liable to be extended on an execution against him.<sup>23</sup> An extent may be made of a chamber in a house or store, with a right of ingress and egress by an outer door, entry, or staircase, if such is incident and necessary to its enjoyment.<sup>24</sup> Where there is a levy upon realty, part of which can and part cannot be held the creditor may obtain an alias execution by proceed-

<sup>12</sup> Rev. Stats. Me., 1883, p. 614, § 1.

<sup>13</sup> Rev. Stats. Me., 1883, p. 615, § 6.

<sup>14</sup> Rev. Stats. Me., 1883, p. 615, § 11.

<sup>15</sup> Rev. Stats. Me., 1883, p. 615, § 12.

<sup>16</sup> Rev. Stats. Me., 1883, p. 615, § 14; *Hall v. Sands*, 52 Me. 355.

<sup>17</sup> Rev. Stats. Me., 1883, p. 618, § 30.

<sup>18</sup> *Dockray v. Mason*, 48 Me. 178.

<sup>19</sup> *McKeen v. Gammon*, 33 Me. 187.

<sup>20</sup> *Coombs v. Warren*, 34 Me. 89; *Randall v. Farnham*, 36 Me. 86; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646.

<sup>21</sup> *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657.

<sup>22</sup> *Kidder v. Orcutt*, 40 Me. 589.

<sup>23</sup> *Woodman v. Bodfish*, 25 Me. 817.

<sup>24</sup> *Buck v. Hardy*, 6 Me. 162; *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107.

ings in *scire facias* or debt for the portion remaining unsatisfied, without waiving his levy upon the parts which he can hold thereby.<sup>25</sup> In Massachusetts, all "lands of the debtor in possession, remainder, or reversion, all his rights of entry into lands and of redeeming mortgaged lands, and all lands and rights above described fraudulently conveyed by him, to defeat, delay, or defraud his creditors, or purchased, or directly or indirectly paid for by him, the record title to which is retained by the vendor, or is conveyed to a third person with intent to defeat, delay, or defraud the creditors of the debtor, or in a trust for him, express or implied, whereby he is entitled to a present conveyance, may be taken on execution for his debts,"<sup>26</sup> except when held as a homestead. "Estates-tail, which could be lawfully barred by the person entitled thereto, may be taken on execution, in the same manner as estates in fee-simple."<sup>27</sup> Under a judgment against the estate of a deceased person, the lands of the deceased may be taken,<sup>28</sup> although they are not included in the inventory.<sup>29</sup> If, however, the judgment is against an executor *de son tort*, no extent on the land of the deceased is authorized.<sup>30</sup> Reversions and remainders may be taken, and seisin given to the creditor.<sup>31</sup> A remainder in tail cannot be taken during the life of the tenant of the estate in

<sup>25</sup> *Rice v. Cook*, 75 Me. 45.

<sup>26</sup> Pub. Stats. Mass., 1882, p. 1008, § 1.

<sup>27</sup> Pub. Stats. Mass., 1882, p. 1008, § 2.

<sup>28</sup> *Gore v. Brazier*, 3 Mass. 523, 3 Am. Dec. 182; *Wyman v. Briden*, 4 Mass. 150; *Drinkwater v. Drinkwater*, 4 Mass. 353; *Dix v. Cobb*, 4 Mass. 512; *Ramsdell v. Creasy*, 10 Mass. 170.

<sup>29</sup> *Prescott v. Tarbell*, 1 Mass. 204.

<sup>30</sup> *Mitchell v. Lunt*, 4 Mass. 654.

<sup>31</sup> *Penniman v. Hollis*, 13 Mass. 432; *Williams v. Amory*, 14 Mass. 20; *Atkins v. Bean*, 14 Mass. 404.

possession.<sup>32</sup> A building so erected that it is not a part of the realty cannot be taken under an extent,<sup>33</sup> but an extent conveys to the creditor all the debtor's buildings standing on the land, whether their foundations are sunk below the surface or not, and a store or house will pass to a creditor under an extent, and need not be sold at the post.<sup>34</sup>

A tenancy by curtesy was formerly subject to extent,<sup>35</sup> but now the rule is otherwise, because the wife, by her conveyance, can at any time terminate the estate.<sup>36</sup> An estate defeasible on some future contingency,<sup>37</sup> and also lands purchased by a husband, and conveyed to his wife to defraud creditors,<sup>38</sup> may be extended. By the provisions of the statutes of New Hampshire, "all real estate, except the homestead right, may be taken on execution."<sup>39</sup> Special provision is made for proceedings when the debtor is seised "of a rent, or of the income of any real estate,"<sup>40</sup> or of an equity of redemption in mortgaged premises.<sup>41</sup> In this state it has been held that an estate for years may be set off under an extent.<sup>42</sup> It has also been held in this state that the homestead right, being a

<sup>32</sup> *Holland v. Cruft*, 3 Gray, 162.

<sup>33</sup> *Marcy v. Darling*, 8 Pick. 283.

<sup>34</sup> *Waterhouse v. Gibson*, 4 Me. 230; *Mills v. Pierce*, 2 N. H. 10.

<sup>35</sup> *Mech. Bank v. Williams*, 17 Pick. 438; *Gardner v. Hooper*, 3 Gray, 308.

<sup>36</sup> *Staples v. Brown*, 13 Allen, 64.

<sup>37</sup> *Phillips v. Rogers*, 12 Met. 405.

<sup>38</sup> *Clark v. Chamberlain*, 13 Allen, 257. With reference to extents of equitable titles, see *Northampton Bank v. Whiting*, 12 Mass. 104; *Russell v. Lewis*, 2 Pick. 508; *Gunn v. Butler*, 18 Pick. 248.

<sup>39</sup> Gen. Laws N. H., 1878, p. 547, § 1.

<sup>40</sup> Gen. Laws N. H., 1878, p. 548, § 10; *Thomas v. Platts*, 43 N. H. 629.

<sup>41</sup> Gen. Laws N. H., 1878, ch. 550.

<sup>42</sup> *Adams v. French*, 2 N. H. 387.

life estate, a reversion of the homestead may be taken under an extent.<sup>43</sup> If an execution is extended on premises in which a homestead right exists, and a demand by the party entitled to the homestead to have the same set off and aside to him according to statute is disregarded, the extent is void in New Hampshire.<sup>44</sup> In Vermont it is held that the homestead must be set out before the residue can be set off under an extent, and that otherwise the levy will be irregular.<sup>45</sup> In Vermont, "all houses, lands, and tenements belonging to any person in his own right in fee, or for his own life, or the life of another, paying no rents for the same, or for years, or an unlimited time, paying rents for the same, and all rights in equity of redeeming lands mortgaged, or in reversion or remainder, shall stand charged with all the just debts and demands owing by such person, and shall be liable to be taken in execution for the same."<sup>46</sup> An extent may be made on the lands of a married woman,<sup>47</sup> on the interest of an heir before distribution of his ancestor's estate,<sup>48</sup> on the interest of a person for whose benefit a bond for a deed has been taken in the name of another,<sup>49</sup> and on the estate of a tenant by curtesy.<sup>50</sup> An extent cannot be made on a "meeting-house,"<sup>51</sup> nor on the estate of one who has executed a perpetual lease,<sup>52</sup> nor

<sup>43</sup> *Cross v. Weare*, 62 N. H. 125.

<sup>44</sup> *Kensell v. Cobleigh*, 62 N. H. 298.

<sup>45</sup> *Fairbanks v. Devereaux*, 48 Vt. 550.

<sup>46</sup> *Rev. Laws Vt.*, 1880, § 1565.

<sup>47</sup> *Fox v. Hatch*, 14 Vt. 340, 39 Am. Dec. 226.

<sup>48</sup> *Hyde v. Barney*, 17 Vt. 280, 44 Am. Dec. 335; *Furlong v. Soule*, 39 Me. 122; *Proctor v. Newhall*, 17 Mass. 81.

<sup>49</sup> *Woods v. Scott*, 14 Vt. 518.

<sup>50</sup> *Hyde v. Barney*, 17 Vt. 280, 44 Am. Dec. 335; *Mattocks v. Stearns*, 9 Vt. 326.

<sup>51</sup> *Bigelow v. Congregational Society*, 11 Vt. 288.

<sup>52</sup> *Paine v. Webster*, 1 Vt. 101.

on the estate of a mortgagee.<sup>53</sup> The creditor cannot, by virtue of his extent, acquire a greater estate than that held by the debtor. Hence, if the debtor is a mere trustee, or otherwise holds the title in his name for the benefit of another, the extent cannot prejudice the rights of the cestui que use, unless made under such circumstances that the creditor is entitled to be treated as a purchaser in good faith without notice.<sup>54</sup>

**§ 374. Number and Qualifications of the Appraisers.** The first act which it is necessary to perform is to secure the appointment of competent appraisers. The number to be chosen is three, being the same in each of the states. Each appraiser must possess the qualifications prescribed by statute. Even the consent of the parties cannot vary this rule, nor give validity to an extent made in violation of it. "It would seem reasonable, if both creditor and debtor should agree upon appraisers from a different town, that this should be sufficient; but it was correctly adjudged, in *Chapman v. Griffin*, 1 Root, 196, agreeably to former decisions, that no title was acquired by the levy of an execution upon land, the same having been appraised by persons agreed on by the creditor and debtor, one of whom did not belong to the town where the land lay. And the determination was made on this invincible reason: 'That the statute is express that the land shall be appraised by freeholders of the same town; and the agreement of the parties cannot alter the

<sup>53</sup> *Barrett v. Sargeant*, 18 Vt. 365; *Blanchard v. Colburn*, 16 Mass. 345; *Eaton v. Whiting*, 3 Pick. 484; *Marsh v. Austin*, 1 Allen, 235. Contra. *Wilkinson v. Lathrop*, Brayt. 163.

<sup>54</sup> *Hackett v. Callender*, 32 Vt. 97; *Bancroft v. Consen*, 13 Allen, 50; *Eastman v. Fletcher*, 45 Me. 302; *Carter v. Porter*, 55 Me. 337; *Warren v. Ireland*, 29 Me. 62.



law.' " <sup>55</sup> In Vermont, an extent was objected to because one of the appraisers was not a freeholder, but, the case being determined upon other grounds, no answer was given to the query whether or not such objection, if proven true, would invalidate the levy. <sup>56</sup>

In some of the states the appraisers must be residents of the town, <sup>57</sup> and in others of the county, <sup>58</sup> in which the land to be appraised is situated. A failure in respect to this qualification is fatal to the title. The appraisers ought to be impartial. Some of the statutes require the appraisers to be "disinterested"; <sup>59</sup> others require them to be "discreet and disinterested"; <sup>60</sup> and others to be "indifferent freeholders." <sup>61</sup> In Vermont it was determined that a return that the appraisers were good and lawful freeholders imports that they were disinterested. <sup>62</sup> In the majority of the instances in which it has been claimed that the appraisers were disqualified, the alleged disqualification consisted in the relationship of the appraisers to one of the parties to the suit. In Maine it is settled that all persons within the sixth degree of consanguinity to

<sup>55</sup> *Metcalf v. Gillet*, 5 Conn. 403; *Mitchell v. Kirtland*, 7 Conn. 229; *Chapman v. Griffin*, 1 Root, 196; *Durant v. Shurtleff*, 49 Vt. 141. Contra, *Cheesborough v. Clark*, 1 Root, 141; *Cutting v. Rockwood*, 2 Pick. 443.

<sup>56</sup> *Danforth v. Beattie*, 43 Vt. 138.

<sup>57</sup> *Chapman v. Griffin*, 1 Root, 196; *Mather v. Chapman*, 6 Conn. 54.

<sup>58</sup> *Rix v. Johnson*, 5 N. H. 520, 22 Am. Dec. 472; *Libbey v. Copp*, 3 N. H. 45; *Simpson v. Coe*, 3 N. H. 85; *Nickerson v. Whittier*, 20 Me. 223. See *Woodman v. Smith*, 37 Me. 21.

<sup>59</sup> *Pierce v. Strickland*, 26 Me. 277; *Grover v. Howard*, 31 Me. 546; *McKeen v. Gammon*, 33 Me. 187.

<sup>60</sup> Gen. Laws N. H., p. 548, § 2; *Glidden v. Philbrick*, 56 Me. 222; *Rollins v. Mooers*, 25 Me. 192; *Bradley v. Bassett*, 2 Cush. 417; *Russ v. Gilman*, 16 Me. 209.

<sup>61</sup> Gen. Stats. Conn., § 1182.

<sup>62</sup> *Day v. Roberts*, 8 Vt. 413.

the parties to the action are not competent to act as appraisers.<sup>63</sup> In New Hampshire, relationship by affinity does not disqualify.<sup>64</sup> This rule does not prevail in the other states. In Connecticut, a nephew by marriage<sup>65</sup> and an uncle by marriage<sup>66</sup> are both disqualified. In the same state an appraiser was adjudged to be disqualified because his wife was the mother of the creditor's wife.<sup>67</sup> An appraisement where one of the appraisers is a son-in-law of the plaintiff is void in Massachusetts.<sup>68</sup> There is no statute of that state "defining the degrees of consanguinity or affinity which shall operate as a disqualification." If an appraiser is a cousin to the plaintiff's mother, their relationship is too remote to constitute a disqualification.<sup>69</sup> A tenant in common with the debtor is disqualified from acting as an appraiser. When the question arose the court said: "This appraiser and the debtor had had precisely similar titles, and a unity of possession in the same land; and, by reason of such interest, the one was disqualified to act as a juror in a case relating to the other's interest in the land, or as an appraiser in determining the price at which his interest should be applied in satisfaction of his creditor's demand."<sup>70</sup> Where the extent of an execution is upon an estate for life it is not rendered invalid by the fact that one of the appraisers was tenant of the es-

<sup>63</sup> *McKeen v. Gammon*, 33 Me. 187.

<sup>64</sup> *Baker v. Davis*, 19 N. H. 325.

<sup>65</sup> *Foot v. Hills*, 1 Conn. 295.

<sup>66</sup> *Tweedy v. Pickett*, 1 Day, 109.

<sup>67</sup> *Johnson v. Huntington*, 13 Conn. 47. The brother-in-law of the officer may act as an appraiser. *Brown v. Washington*, 110 Mass. 529.

<sup>68</sup> *Wolcott v. Ely*, 2 Allen. 338.

<sup>69</sup> *Kinsman v. Warner*, 113 Mass. 347.

<sup>70</sup> *Cowdrey v. Sheldon*, 122 Mass. 267.

tate in reversion.<sup>71</sup> In Vermont the fact that a person has feelings unfriendly to one of the parties does not render him incompetent.<sup>72</sup> In that state it was held that an extent was not invalidated by the fact that one of the appraisers was son of the debtor, the creditor being cognizant thereof and acquiescing in the selection.<sup>73</sup> In New Hampshire an attorney who conducted the action is regarded as being sufficiently disinterested to act as an appraiser.<sup>74</sup> Under an execution against a town or city, one of its inhabitants cannot act as an appraiser.<sup>75</sup> But persons resident and paying taxes in a town which in its corporate capacity holds stock in a railroad company are not incompetent from interest to act as appraisers in the levy of an execution against such company.<sup>76</sup> In Maine, where one deputy is making an extent, another deputy of the same sheriff may act as an appraiser.<sup>77</sup>

**§ 375. Appraisers, how and by Whom Chosen.**—One of the appraisers is chosen by the creditor, and another by the debtor, where he can be found, and sees proper to exercise his choice. In some of the states, the third appraiser is selected by the officer having the execution; in others, he is chosen by the parties, if they can agree. In case they cannot agree, the appointment may be made by a justice of the peace. If the debtor, upon proper notice, refuses or neglects to choose an appraiser, one may be chosen for him. This is done in some states by the levying officer, and in others by

<sup>71</sup> *Chamberlain v. Doty*, 18 Pick. 495.

<sup>72</sup> *Briggs v. Green*, 33 Vt. 565.

<sup>73</sup> *Durant v. Shurtleff*, 49 Vt. 141.

<sup>74</sup> *Porter v. Bean*, 1 N. H. 362.

<sup>75</sup> *Boston v. Tileston*, 11 Mass. 468.

<sup>76</sup> *Fletcher v. Somerset R. R. Co.*, 74 Me. 434.

<sup>77</sup> *Grover v. Howard*, 31 Me. 546.

a justice of the peace. It is obvious that the right of the debtor to participate in the selection of the appraisers is one which may be of great importance to him. He cannot be deprived of this right as long as he is present and is willing and able to exercise it. He must have reasonable notice<sup>78</sup> of the proposed levy upon his property, and requested to select his appraiser. No extent can be valid unless it appears from the record that the debtor had this notice and made this appointment, or that the circumstances were such as to justify the officer in dispensing with the notice, or in making the appointment, or having it made on behalf of the debtor.<sup>79</sup> When there are two or more defendants, and an extent is to be made on a tract of land belonging to all of them, it is sufficient that a notice to appoint an appraiser be given to any one of them. But if the extent is to be made on lands belonging to one of them, the notice must be given to that one, and the return of the officer must so state.<sup>80</sup> When two or more of the defendants are owners of the land as joint tenants or as tenants in common, either may select the appraiser to be chosen on behalf of the defendants. In many instances, it becomes either impossible or highly inconvenient to notify the defendant of the levy, and request him to select an appraiser. Where this is the case, the officer is usually authorized to dispense with the notice. Such notice

<sup>78</sup> Pub. Stats. Mass., 1882, p. 1008, § 3; *Buck v. Hardy*, 6 Me. 162; *Howe v. Wildes*, 34 Me. 566; *Fitch v. Tyler*, 34 Me. 463.

<sup>79</sup> *Blanchard v. Brooks*, 12 Pick. 47; *Cogswell v. Mason*, 9 N. H. 48; *Howe v. Wildes*, 34 Me. 566; *Briggs v. Green*, 33 Vt. 565; *Means v. Osgood*, 7 Me. 146; *Stanton v. Bannister*, 2 Vt. 464; *Shields v. Hastings*, 10 Cush. 247; *Leonard v. Bryant*, 2 Cush. 32.

<sup>80</sup> *Harriman v. Cummings*, 45 Me. 351; *Herring v. Polley*, 8 Mass. 113; *Ware v. Barker*, 49 Me. 358; *Whittier v. Varney*, 10 N. H. 291; *Boynton v. Grant*, 52 Me. 220.

is properly served by leaving it at the last and usual place of abode of the defendant.<sup>81</sup>

Hence, when the defendant resides out of the state,<sup>82</sup> or out of the county,<sup>83</sup> or has departed for parts unknown,<sup>84</sup> or is a corporation having no acting officers,<sup>85</sup> the officer need not give him any notice. The fact excusing the notice must always be disclosed by the return.<sup>86</sup> A return that, "the debtor being absent," the officer selected the appraiser, is not sufficient to show that the officer was authorized to make such selection.<sup>87</sup> In Connecticut, it was held that when a defendant was confined in a penitentiary, notice could be given by leaving a copy at the residence of his family.<sup>88</sup> Notice need not be given to the defendant's attorney who conducted the suit, unless it is known that he has been specially authorized to receive such notice, and to select the appraiser.<sup>89</sup> The fact that the defendant is a person for whom, under the laws of Connecticut, an overseer has been appointed, does not render him incompetent to select an appraiser.<sup>90</sup> If

<sup>81</sup> Croacher v. Oesting, 143 Mass. 195; Buck v. Hardy, 6 Me. 162.

<sup>82</sup> Cooper v. Bisbee, 4 N. H. 329; Pendleton v. Button, 3 Conn. 406; Gilman v. Thompson, 11 Vt. 643, 34 Am. Dec. 714. For law of Massachusetts in reference to appointing appraisers for absentees, see Randall v. Wyman, 16 Gray, 334; Pub. Stats. Mass., 1882, p. 1009, § 7.

<sup>83</sup> Dodge v. Farnsworth, 19 Me. 278; Buck v. Hardy, 6 Greenl. 162; Howe v. Reed, 12 Me. 515.

<sup>84</sup> Parrish v. Harriman, 3 N. H. 317; Galusha v. Sinclair, 3 Vt. 394; Dodge v. Prince, 4 Vt. 191.

<sup>85</sup> Spencer v. Champion, 9 Conn. 543.

<sup>86</sup> Nickerson v. Whittier, 20 Me. 223.

<sup>87</sup> Woodward v. Gates, 4 N. H. 548.

<sup>88</sup> Grant v. Dalliber, 11 Conn. 234.

<sup>89</sup> Galusha v. Sinclair, 3 Vt. 394.

<sup>90</sup> Strong v. Birchard, 5 Conn. 357. A married woman may appoint appraisers when the execution is against her. Mun v. Carrington, 2 Root, 15.

the defendant is a party, in the capacity of administrator, he must, nevertheless, be notified, and may choose an appraiser.<sup>91</sup> The defendant, in selecting an appraiser, may act by his agent.<sup>92</sup> His wife may act as such agent.<sup>93</sup> A return showing that an appraiser was selected by the defendant's agent,<sup>94</sup> or attorney,<sup>95</sup> or that defendant's agent or attorney, having been duly notified, neglected to choose an appraiser, is sufficient<sup>96</sup> to sustain a subsequent extent based upon it. The officer's return must show by whom the appraisers were appointed. If it fails to do this, the extent will be void.<sup>97</sup> If it shows that the appraiser, which the law allows the debtor to appoint, was not appointed by him, but by the officer for him, it must show the facts which authorized the officer to so act on behalf of the debtor. If the defendant, upon receiving proper notice, refuses or declines to act, his right to select an appraiser is thereby waived.<sup>98</sup> A return which states that the debtor "neglected and refused,"<sup>99</sup> or that he "refused,"<sup>100</sup> or that he "neglected,"<sup>101</sup> to appoint an appraiser, is sufficient to sustain an appointment made by the officer.

A return setting forth that the officer gave notice to the debtor "to choose an appraiser, which he declined

<sup>91</sup> Daniels v. Ellison, 3 N. H. 279.

<sup>92</sup> Odiorne v. Mason, 9 N. H. 24.

<sup>93</sup> Russell v. Hook, 4 Greenl. 372.

<sup>94</sup> Roop v. Johnson, 23 Me. 335.

<sup>95</sup> Chappell v. Hunt, 8 Gray, 427.

<sup>96</sup> Dooley v. Wolcott, 4 Allen, 406.

<sup>97</sup> Banister v. Higginson, 15 Me. 73; Allen v. Thayer, 17 Mass. 299; Cogswell v. Mason, 9 N. H. 48.

<sup>98</sup> Keen v. Briggs, 46 Me. 467.

<sup>99</sup> Thompson v. Oakes, 13 Me. 407.

<sup>100</sup> Fitch v. Tyler, 34 Me. 463; Sturdivant v. Sweetsir, 12 Me. 520.

<sup>101</sup> Blanchard v. Brooks, 12 Pick. 47; Johnson v. Huntington, 13 Conn. 47; Bugnon v. Howes, 13 Me. 154; Smith v. Keen, 26 Me. 411.

and refused to do" is sufficient to justify an appointment by the officer although, through a clerical error, it incorrectly sets forth the date when the notice was given.<sup>102</sup>

The use of the words "neglect" or "refuse" implies that a proper notice and demand were made, because, until they were made, there could be no refusal or neglect on the part of the debtor. A return stating that an appraiser was appointed "for the debtor, he being absent from the commonwealth, and not a resident therein, and having no agent or attorney known to the officer," shows a sufficient reason for such appointment, without also stating that the debtor had neglected to appoint.<sup>103</sup>

Where an officer's return discloses that he selected two of the appraisers, the defendant "having no residence nor stopping in Maine," but it did not appear that the defendant had no attorney within the county, or that any one was notified as an attorney, and neglected or refused to choose an appraiser, the levy was held fatally defective.<sup>104</sup>

A justice of the peace, who has been named as one of the appraisers, is not thereby disqualified from appointing another appraiser on behalf of the debtor.<sup>105</sup> The statement in a return "that the debtor was not an inhabitant of the officer's precinct, or resident therein, and could not be served with notice, cannot be regarded as equivalent to the statement that the debtor was absent from or not a resident in the state; or that he neglected to appoint an appraiser."<sup>106</sup> If the offi-

<sup>102</sup> *Peaks v. Gifford*, 78 Me. 362.

<sup>103</sup> *Randall v. Wyman*, 16 Gray, 334.

<sup>104</sup> *Williamson v. Wright*, 75 Me. 35.

<sup>105</sup> *Pendleton v. Button*, 3 Conn. 406.

<sup>106</sup> *Brooks v. Norris*, 124 Mass. 172.

cer returns that the debtor had removed to another state, and had no attorney known to the officer, but that one of the appraisers was appointed by a person who claimed to act as the authorized agent of the defendant, this is not sufficient to support the extent. The debtor being absent from and not a resident of this state, a contingency had arisen in which his authorized agent might appoint in his stead. But the statute requires that such agent should be known to the officer as the debtor's agent or attorney, and, if not so known, then the officer must appoint for the debtor, and return the fact that there was no such agent or attorney known to him. The return in this case may be true, and yet the person who claimed to be an agent be a person wholly unauthorized and unknown to the debtor. The language of the return implies want of knowledge by the officer of the existence of the alleged agency. The law puts upon him the responsibility of determining the fact of agency, and makes his return conclusive in a real action to recover the land on the ground of the alleged defect in the levy.<sup>107</sup> The officer has no authority to appoint an appraiser to act for the creditor. If he does so, his unauthorized act cannot be ratified "by the subsequent act of the creditor acknowledging the receipt of seisin and possession in full satisfaction of the execution." The appraisement is void.<sup>108</sup>

**§ 376. Swearing the Appraisers.**—After the three appraisers have been appointed, they must take their oaths of office. Here, as elsewhere, all the provisions of the statute must be substantially pursued to impart

<sup>107</sup> *Dewey v. Tobey*, 126 Mass. 96.

<sup>108</sup> *Richardson v. Payne*, 114 Mass. 429.



validity to the extent. In Maine and Massachusetts the oath may be administered by the officer or by a justice of the peace.<sup>109</sup> In New Hampshire they must be sworn by a justice,<sup>110</sup> and in Vermont by the officer.<sup>111</sup> The statute of Connecticut provides that the appraisers shall "be duly sworn,"<sup>112</sup> without stating by whom the oath should be administered. The return of the officer must show that the oath of the appraisers was taken before one of the officers designated in the statute.<sup>113</sup> It has been decided that the creditor, if he is an officer otherwise competent, may administer the oath.<sup>114</sup> But, on the other hand, it has been held that the deputy executing the writ cannot, acting as a justice of the peace, administer the oath.<sup>115</sup> Justices, acting as appraisers, may swear one another.<sup>116</sup> In Maine the oath must be indorsed on the writ. The return of the officer may refer to this indorsement for the purpose of showing that the oath was taken in due form.<sup>117</sup> The provision in the Maine statute requiring the indorsement of the oath upon the writ may be considered as directory to the officer rather than vital to the levy. The statute is not complied with by making the certificate of the oath on another paper and attaching it to the writ, yet this defect will not invalidate a levy as between the debtor and an innocent purchaser from him on whose behalf

<sup>109</sup> Rev. Stats. Me., 1883, p. 614, § 2; Gen. Stats. Mass., p. 517, § 3.

<sup>110</sup> Gen. Laws N. H., p. 548, § 2.

<sup>111</sup> Rev. Laws Vt., 1880, § 1571.

<sup>112</sup> Gen. Stats. Conn., 1888, § 1182.

<sup>113</sup> Howard v. Turner, 6 Greenl. 106.

<sup>114</sup> Porter v. Bean, 1 N. H. 362; Atherton v. Jones, 1 N. H. 363.

<sup>115</sup> Bamford v. Melvin, 7 Me. 14.

<sup>116</sup> Barnard v. Fisher, 7 Mass. 71.

<sup>117</sup> Fitch v. Tyler, 34 Me. 463.

the levy was made.<sup>118</sup> The justice need not sign the oath. It is sufficient that the return shows that he administered it.<sup>119</sup> In Maine<sup>120</sup> and Massachusetts<sup>121</sup> the appraisers are sworn faithfully and impartially to appraise the real estate to be taken; in New Hampshire, "impartially to appraise such real estate as shall be shown them as the estate of the debtor";<sup>122</sup> in Vermont they must simply be sworn,<sup>123</sup> and in Connecticut the terms of the oath are not prescribed, it being only provided that they "being duly sworn" shall make an estimate of the real estate "according to its true value."<sup>124</sup> In Kansas,<sup>125</sup> a return that appraisers were "duly sworn" is sufficient. So in Maine and Massachusetts, the officer may return "that the appraisers were first sworn according to law," without showing the form of the oath taken.<sup>126</sup> As a general rule, courts prefer to judge for themselves whether proceedings are conducted in compliance with law; and, hence, in some of the states, officers are required to show what acts have been done, and in what manner such acts were accomplished.<sup>127</sup> Therefore, unless some statute has dispensed with this formality, the courts usually hold that the return of the officer must show the form of the oath administered to the appraisers; and the form so shown must be in substan-

<sup>118</sup> *Hall v. Staples*, 74 Me. 178.

<sup>119</sup> *Phillips v. Williams*, 14 Me. 411.

<sup>120</sup> Rev. Stats. Me., 1883, p. 614, § 2.

<sup>121</sup> Pub. Stats. Mass., 1882, p. 1009, § 8.

<sup>122</sup> Gen. Laws N. H., p. 444, § 2.

<sup>123</sup> Rev. Laws Vt., 1880, § 1571.

<sup>124</sup> Gen. Stats. Conn., § 1182.

<sup>125</sup> *Paine v. Spratley*, 5 Kan. 543.

<sup>126</sup> *Leonard v. Bryant*, 2 Cush. 32; *Bamford v. Melvin*, 7 Greenl. 14; *Barnard v. Fisher*, 7 Mass. 71.

<sup>127</sup> *Henry v. Tilson*, 19 Vt. 447; *Ainsworth v. Dean*, 1 Fost. 400; *Sleeper v. Newbury Seminary*, 19 Vt. 451.

tial conformity with that prescribed by statute.<sup>128</sup> Various modes of administering oaths have been prescribed, owing to the difference in the religious opinions of the persons to be sworn. The officer swearing an appraiser should adopt the mode most binding on the latter's conscience.<sup>129</sup> Persons having conscientious scruples against taking an oath may be permitted to affirm in the manner prescribed for Quakers.<sup>130</sup>

**§ 377. Proceedings of the Appraisers.**—After taking their oaths of office, the appraisers must proceed to view and examine the land, as far as may be necessary, to enable them to make a just estimate of its value. It is not essential that they should enter upon the land if, without so doing, they can sufficiently determine its character and value.<sup>131</sup> The appraisers must all act. It is not required, however, that their judgment should be unanimous. One may dissent from the appraisal, and on that ground may refuse to join in the certificate. If the record shows that all the appraisers entered upon the performance of their duties, viewed the land, and made estimates of its value, the extent will be sustained, though, from a disagreement among the appraisers,<sup>132</sup> or from some cause not disclosed to the court,<sup>133</sup> only two of them sign the certifi-

<sup>128</sup> *Chamberlain v. Doty*, 18 Pick. 495; *Howard v. Turner*, 6 Greenl. 106; *Kellenberger v. Sturtevant*, 11 Cush. 160. *Contra*, *Eastman v. Curtis*, 4 Vt. 616, where return that appraisers were sworn "as the law directs" was upheld.

<sup>129</sup> *Cooper v. Bisbee*, 4 N. H. 329.

<sup>130</sup> *Hall v. Hoxie*, 3 Met. 251.

<sup>131</sup> *Hanly v. Sidelinger*, 52 Me. 138; *Pendleton v. Button*, 8 Conn. 406; *Bond v. Bond*, 2 Pick. 382; *Hammatt v. Bassett*, 2 Pick. 564.

<sup>132</sup> *Moffitt v. Jaquins*, 2 Pick. 331; *Hopkins v. Haywood*, 36 Vt. 318.

<sup>133</sup> *Barrett v. Porter*, 14 Mass. 143; *Phillips v. Williams*, 14 Me. 411; *Munroe v. Reding*, 15 Me. 153; *McLellan v. Nelson*, 27 Me. 129. See *Whitman v. Tyler*, 8 Mass. 284.

cate. If the levy is upon the lands of several defendants owning in severalty, the appraisers must separately appraise the lands of each.<sup>134</sup> But if several separate tracts belong to one defendant, they may be appraised either severally or jointly.<sup>135</sup> A levy is not void for taking at the same time, as one act, two parcels of a farm, the parcels lying side by side, at separate appraisals.<sup>136</sup> Where the lands to be taken are in different parts of the county, they may be appraised by different sets of appraisers.<sup>137</sup> They need not show that they have estimated upon every item in detail; but they are presumed to have taken into consideration, and to have embraced in their appraisal, the lands shown them, and everything attached thereto which could pass by the extent.<sup>138</sup> The appraisers should ascertain the value of the interest set off, in order that the debtor may redeem. A failure to do this spoils the effect of a levy.<sup>139</sup> When the appraisal is of a large tract, at a certain price per acre, the officer may, without any new appraisal, set off a portion of the tract to the creditor at the same price per acre, unless it can be shown that he acted unfairly, and that the portion so set off is more valuable than the average.<sup>140</sup> The appraisal must embrace the entire interest of the defendant. Until the contrary is shown, the appraisers should estimate the defendant's

<sup>134</sup> *Burnham v. Aiken*, 6 N. H. 306.

<sup>135</sup> *Barnard v. Fisher*, 7 Mass. 71; *Bond v. Bond*, 2 Pick. 382; *Atherton v. Jones*, 1 N. H. 363.

<sup>136</sup> *Hathorn v. Carson*, 77 Me. 582.

<sup>137</sup> *Boylston v. Carver*, 11 Mass. 515.

<sup>138</sup> *Payne v. Farmers' Bank*, 29 Conn. 415; *Trull v. Fuller*, 28 Me. 545.

<sup>139</sup> *Fairbanks v. Devereaux*, 48 Vt. 550.

<sup>140</sup> *Marcy v. Kinney*, 9 Conn. 394.

interest as a fee simple in severalty, in possession, and free from encumbrances. They have no right to split his estate into different estates, or different kinds of property. If he has buildings, they have no right to estimate the land, reserving him the buildings to hold as personalty. If such a reservation is made, no title passes to the lands on which the buildings stand, nor to adjacent lands necessary to their enjoyment.<sup>141</sup> The appraisement may be based upon the belief that the defendant's estate is greater, and, therefore, more valuable, than it is afterward proved to be. In this event, it is the creditor who is damaged, and who alone has cause for complaint. If he acquiesces in the appraisement, no one else can assail it on that ground.<sup>142</sup> If, on the other hand, the defendant has an estate greater or more valuable than that appraised, he is obviously damaged, and may treat the extent, based on the erroneous appraisement, as void.<sup>143</sup> In Connecticut, where an estimate was made too low by reason of the appraiser being influenced by an erroneous principle of law, the debtor sought and found relief in equity. The creditor was directed to reconvey a portion of the lands acquired by his extent.<sup>144</sup> The determination of the appraisers, in any matter which they are authorized to determine, is conclusive, unless it can be assailed for fraud.<sup>145</sup>

<sup>141</sup> *Jewett v. Whitney*, 43 Me. 250; 51 Me. 233; *Hemenway v. Cutler*, 51 Me. 407; *Grover v. Howard*, 31 Me. 546.

<sup>142</sup> *Atkins v. Bean*, 14 Mass. 404; *Patterson v. Chandler*, 55 Me. 53; *Swanton v. Crooker*, 49 Me. 455; *Howe v. Wildes*, 34 Me. 566; *Hitchcock v. Hotchkiss*, 1 Conn. 470; *Glidden v. Philbrick*, 56 Me. 222.

<sup>143</sup> *Root v. Colton*, 1 Met. 345; *Fish v. Sawyer*, 11 Conn. 551.

<sup>144</sup> *Fitch v. Ayer*, 2 Conn. 143.

<sup>145</sup> *Hilton v. Hanson*, 18 Me. 397; *Waterman v. Curtis*, 26 Conn. 241.

§ 378. **The Certificate of the Appraisers.**—When the appraisers have completed their duty of examining and valuing the property to be taken under the writ, they must make their certificate of appraisement. Thus, the statute of Connecticut provides that the appraisers, “being sworn according to law, shall make an estimate of such lands or real estate according to its true value in writing, under their hands or the hands of either two of them, and the same deliver to such officer.”<sup>146</sup> It is indispensable that the estimate of the appraisers should be in writing,<sup>147</sup> and should show at what sum the real estate was appraised.<sup>148</sup> It is not sufficient for appraisers to certify that they “set off said undivided fifth part to the creditor in full satisfaction of this execution and costs of levy,” if there is no statement of the appraised value of the property set off. This deficiency is not supplied by the return of the officer that they appraised the property for a stated sum.<sup>149</sup> But it is not essential that any particular form should be pursued in the certificate, if it is sufficient in substance to correctly inform the officer of the valuation which has been made.<sup>150</sup> The statute of Massachusetts, on this subject, simply requires that “a certificate of their appraisement shall be indorsed on the execution, and signed by them.”<sup>151</sup> In Maine, the appraisers “are, in a return made and signed by them on the back or annexed to the execution, to state the value of the

<sup>146</sup> Stats. Conn., p. 56, § 251.

<sup>147</sup> *Metcalf v. Gillet*, 5 Conn. 400.

<sup>148</sup> *Mead v. Harvey*, 2 N. H. 495; *Fairbanks v. Devereaux*, 48 Vt. 550.

<sup>149</sup> *Chase v. Williams*, 71 Me. 190.

<sup>150</sup> *Peck v. Wallace*, 9 Conn. 453.

<sup>151</sup> Stats. Mass., 1882, p. 1009, § 8.

estate appraised, and describe it by metes and bounds, or in such other manner that it may be distinctly known and identified, whatever the nature of the estate may be.”<sup>152</sup> The appraisers’ certificate need not state the amount of the debt, fees, and charges of the execution. These may be ascertained by inspecting the writ.<sup>153</sup> The appraisers may reconsider their appraisal at any time before their certificate is delivered to the officer. Their power to do this is not terminated by their giving the certificate to any other person.<sup>154</sup>

**§ 379. When an Extent need not be Made by Metes and Bounds.**—Where the tract of land upon which the levy has been made is more than sufficient to satisfy the writ, it becomes necessary to segregate and set off such portion by metes and bounds as will be no more than necessary for the purpose of such satisfaction. Where, also, a part of the land upon which levy has been made is exempt from execution, as where it constitutes a homestead, it is necessary that such exempt portion be set off by metes and bounds; otherwise the levy is void.<sup>155</sup> Where such a segregation is impossible, or will greatly damage the property and impair its value, the statutes generally authorize an extent to be made upon an undivided part of the whole. But the presumption is always against the authority to extend a moiety, where the debtor holds in severalty. In the event of such an extent being made, a sufficient reason for so making it must appear in the return;

<sup>152</sup> Stats. Me., 1883, p. 614, § 3.

<sup>153</sup> Rawson v. Clark, 38 Me. 223.

<sup>154</sup> Bill v. Pratt, 5 Conn. 123; Camp v. Bates, 13 Conn. 1.

<sup>155</sup> Whitefield v. Adams, 65 Vt. 632.

otherwise the extent is void.<sup>156</sup> In Maine, "when the premises consist of a mill, mill privilege or other estate more than sufficient to satisfy the execution, which cannot be divided by metes and bounds without damage to the whole, an undivided part of it may be taken, and the whole described," or a levy may be made on the rents and profits.<sup>157</sup> The statute of Massachusetts provides that "when the premises levied upon consist of a mill, mill privilege, or other real estate, which cannot be divided without damage to the whole, and which is more than sufficient to satisfy the execution, the levy shall be made upon an undivided portion of the whole, to be determined by the appraisers, and to contain as much as they deem sufficient to satisfy the execution; and the portion thus taken shall be held in common with the debtor."<sup>158</sup> In New Hampshire, "if the real estate cannot, in the judgment of the appraisers, be divided and set out by metes and bounds without greatly impairing the value of the whole, the levy may be made upon an undivided interest therein, or by such mode of division as the nature of the property will admit."<sup>159</sup> "If any real estate on which execution may be extended cannot, in the opinion of the appraisers, be divided without great injury to the interest of the parties, they may," in Vermont, "set off such an undivided part thereof as shall be sufficient to satisfy the execution, and the officer's fees and charges for serving the same."<sup>160</sup> The question whether the ex-

<sup>156</sup> *Nye v. Drake*, 9 Pick. 35; *Pickering v. Reynolds*, 111 Mass. 83; *Edwards v. Allen*, 27 Vt. 381; *Sleeper v. Newbury Seminary*, 19 Vt. 451; *Brown v. Clifford*, 38 Me. 210; *Merrill v. Burbank*, 23 Me. 538; *Hilton v. Hanson*, 18 Me. 397; 4 Conn. 489; *Morgan v. Armington*, 33 Vt. 13.

<sup>157</sup> Rev. Stats. Me., 1883, p. 615, § 10.

<sup>158</sup> Pub. Stats. Mass., 1882, p. 1010, § 15.

<sup>159</sup> Gen. Laws N. H., 1878, p. 548, § 8.

<sup>160</sup> Rev. Laws Vt., 1880, § 1584.



tent ought to be made by metes and bounds, or by setting off an undivided interest, is one which, under some of the statutes, is to be determined by the appraisers, and, under other statutes, by the officer executing the writ. The determination made is, in the absence of fraud or collusion, binding upon the parties in interest. The extent cannot be avoided by showing that the decision of the officer or of the appraisers was erroneous.<sup>161</sup> The fact that a part of a house was set off in severalty does not, of itself, warrant the inference that the creditor, "or the officer, or the appraisers, were guilty of any fraud or misconduct."<sup>162</sup> The extending of an undivided moiety may often be avoided by dividing the lands by metes and bounds, and giving one of the parties an easement over the lands of the other. Hence, an extent may be made of a chamber in a house or store, with a right of ingress and egress by an outer door, entry, and staircase,<sup>163</sup> or of one part of the debtor's lands, to which no access can be had but over other lands of the debtor, by giving the creditor a right of passage over such other lands, either separately or jointly with the debtor.<sup>164</sup> Where the officer has several writs in his hands of equal date, it may sometimes be necessary for him to set off the whole lands to the creditors as tenants in common;<sup>165</sup> but an equity of redemption, because of its indivisibility, cannot be thus extended.<sup>166</sup>

**§ 380. Extending Executions on the Lands of Cotenants.**—The statutes of New Hampshire provide that

<sup>161</sup> *Mansfield v. Jack*, 24 Me. 98.

<sup>162</sup> *Tift v. Walker*, 10 N. H. 150.

<sup>163</sup> *Buck v. Hardy*, 6 Greenl. 162.

<sup>164</sup> *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107.

<sup>165</sup> *Jessup v. Batterson*, 5 Day, 368; *Lee v. Hinman*, 6 Conn. 165.

<sup>166</sup> *Franklin v. Gorham*, 2 Day, 142, 2 Am. Dec. 86.

when "real estate is holden jointly or in common with others, the levy shall be made upon the undivided interest of the debtor, or a part thereof." <sup>167</sup> In Vermont, "when the real estate of any debtor shall be held in joint tenancy, coparcenary, or tenancy in common with the real estate of other persons, the officer may extend the execution of such debtor's undivided interest in such real estate, describing the same with as much precision as the nature and situation thereof will admit." <sup>168</sup> A levy upon the interest of a cotenant is valid in Maine, where the appraisers describe the whole lot by metes and bounds and then appraise a specified fractional undivided part of the whole as the property of the debtor, and set the same off to the creditor. <sup>169</sup> In Massachusetts, "when land is held by a debtor in joint tenancy or in common, the part or share thereof belonging to the debtor may be taken on execution, and shall be thereafter held in common with the cotenant. If the whole share of the debtor is more than sufficient to satisfy such execution, the levy shall be made upon an undivided portion of such share, to be determined by the appraisers, and to contain as much as they deem sufficient to satisfy the execution." <sup>170</sup> Whether a tenant in common can make a conveyance of any specific part of the lands of the cotenancy by metes and bounds which will vest any interest in the grantee, has been frequently discussed, and has been differently determined in different states. <sup>171</sup> It is everywhere admitted that such a conveyance will not be permitted to prejudice the right of the cotenants

<sup>167</sup> Gen. Laws N. H., p. 548, § 7.

<sup>168</sup> Rev. Laws Vt., 1880, § 1583.

<sup>169</sup> French v. Lord, 69 Me. 537.

<sup>170</sup> Stats. Mass., 1882, p. 1010, § 14.

<sup>171</sup> Freeman on Cotenancy and Partition, §§ 199-206.

of the grantor to partition. But in most of the states, such a conveyance is recognized and enforced as against the grantor, and also against the other cotenants, so far as it may be without prejudicing their rights to partition. With respect to involuntary transfers of real estate by extent or by sale under execution, there are a few authorities which seem to sustain the transfer of a cotenant's interest in a specific part by metes and bounds, except as against the objection of the defendant's cotenants.<sup>172</sup> But in a decided majority of the cases the rule has been held otherwise, and extents on the lands of a cotenant have been held void, unless they embraced an undivided portion of all the land, and not a part by metes and bounds.<sup>173</sup> Thus, where a husband and wife hold land in undivided portions an execution against the husband cannot, as against the wife, be extended upon a part of such land by metes and bounds, even though the officer making the extent has, in accordance with the request of the husband and wife, caused the residue of the land to be set off by metes and bounds as a homestead.<sup>174</sup> In New Hampshire, this rule has been enforced where the defendant was a cotenant of several distinct parcels of real estate; and it was held that the extent must be upon an undivided part of each parcel.<sup>175</sup> On the

<sup>172</sup> *Godwin v. Gregg*, 28 Me. 188, 48 Am. Dec. 489; *Howe v. Blanden*, 21 Vt. 315.

<sup>173</sup> *Bartlett v. Harlow*, 12 Mass. 348; *Gregory v. Tozler*, 24 Me. 808; *Peabody v. Minot*, 24 Pick. 329; *Starr v. Leavitt*, 2 Conn. 243, 7 Am. Dec. 268; *French v. Lund*, 1 N. H. 42, 8 Am. Dec. 31; *Smith v. Knight*, 20 N. H. 9; *Hinman v. Leavenworth*, 2 Conn. 244; *Brown v. Clifford*, 38 Me. 210; *Hilton v. Hanson*, 18 Me. 397; *Merrill v. Burbank*, 23 Me. 538; *Galusha v. Sinclear*, 3 Vt. 394; *Smith v. Benson*, 9 Vt. 138, 31 Am. Dec. 614; *Baldwin v. Whiting*, 13 Mass. 57.

<sup>174</sup> *Carter v. Beals*, 44 N. H. 408.

<sup>175</sup> *Thompson v. Barber*, 12 N. H. 563.

other hand, it has been determined, in Connecticut, that where a debtor is a cotenant of several distinct parcels of land held by distinct cotenancies, the officer must not extend an undivided interest in the whole, unless the debtor's entire interest in all the tracts is needed to satisfy the writ; that the officer must extend the debtor's entire interest in some one tract, and, if this proves insufficient, he must then proceed to extend some other tract.<sup>176</sup> A levy upon and extending of the lands of a cotenant, as though he were seised of an estate in severalty, will pass his interest, if the creditor should so elect.<sup>177</sup> The effect of an extent upon the interest of a joint tenant is to pass to the creditor a cotenant's interest in the land of the joint tenancy. Therefore, there is no imperative necessity for stating in the levy that the estate was held in joint tenancy and not in common, if the whole estate be described and the share of it owned by the debtor and levied on be stated.<sup>178</sup>

§ 381. Extent for too Great an Amount.—The officers of the law are authorized to set off only so much land as is necessary to satisfy the execution. Unless some special statute exists, an extent for an amount greater than authorized by the writ is altogether void.<sup>179</sup> The excess may, however, be so small that it will be disregarded, because the amount is too trivial to warrant the court in taking any notice of it. What amount may be regarded as so trivial is, perhaps, not

<sup>176</sup> *Starr v. Leavitt*, 2 Conn. 243, 7 Am. Dec. 268.

<sup>177</sup> *Davis v. Barnard*, 60 N. H. 550; *Coos Bank v. Brooks*, 2 N. H. 148; *Bartlett v. Harlow*, 12 Mass. 348; *Atkins v. Bean*, 14 Mass. 404.

<sup>178</sup> *Chase v. Williams*, 71 Me. 190.

<sup>179</sup> *Boyd v. Page*, 30 Me. 460, where the excess was \$12.26; *Skinner v. McDaniel*, 5 Vt. 539; *McGregor v. Williams*, 10 Cush. 526; *French v. Eaton*, 15 N. H. 337; *Beach v. Walker*, 6 Conn. 190; *Prescott v. Prescott*, 62 Me. 428.

clearly ascertained. Probably the rule best sustained by reason and authority is, that if the excess exceeds the value of the smallest coin which by law is made a legal tender, it must be regarded as material, and as an avoidance of the levy;<sup>180</sup> while, on the other hand, if the excess is less than the value of such coin, it must be disregarded.<sup>181</sup> It has been contended that an amount of excess would be disregarded in an extent for a large sum that would not be overlooked in an extent for a small sum. But this view has been overruled. Thus, in *Chenery v. Stevens*<sup>182</sup> the court said: "The counsel for the tenant is in error in supposing that the validity of a levy, where land has been set off for too large a sum, may be made to depend on the proportion which such excess bears to the whole amount of the execution; or, in other words, that if the error is relatively small as compared with the debt, it is immaterial that more land has been set off to the creditor than he is justly entitled to. But this cannot do. In the transfer of title to real estate by virtue of a statute power, the requisitions of the law must be

<sup>180</sup> *Glidden v. Chase*, 35 Me. 90, 56 Am. Dec. 690, where the excess was fourteen cents; *Huse v. Merriam*, 2 Greenl. 375; *Boyden v. Moore*, 5 Mass. 365; *Pickett v. Breckenridge*, 22 Pick. 297, 33 Am. Dec. 745, where the excess was three dollars; *Webster v. Hill*, 38 Me. 78, where the excess was one dollar; *Bachelor v. Thompson*, 41 Me. 539; *Brown v. Lunt*, 37 Me. 423; *Thayer v. Mayo*, 34 Me. 139, where the excess was fifty-two cents; *Bates v. Willard*, 10 Met. 79; *Grosvenor v. Chesley*, 43 Me. 369, where an excess of six cents was said not to be a "trifle."

<sup>181</sup> *Dwinel v. Soper*, 32 Me. 119, 52 Am. Dec. 643, where the excess was thirteen mills; but in Connecticut a levy for ten cents too much, and another for seventeen cents too much, were held valid. *Huntington v. Winchell*, 8 Conn. 45, 20 Am. Dec. 84. So, also, a levy of fourteen cents was held too much. *Spencer v. Champion*, 9 Conn. 536; see, also, *Hathaway v. Hemingway*, 20 Conn. 191; *Avery v. Bowman*, 40 N. H. 453, 77 Am. Dec. 728.

<sup>182</sup> 97 Mass. 77.

strictly complied with. The sheriff can take no more land than is exactly necessary to satisfy the execution. If he errs in this respect, as a levy cannot be void in part and valid in part, the whole is void." While an extent for more than the amount authorized by the execution has been usually held void, the rule is different with an extent based partly on excessive or illegal fees charged by the officer for executing the writ. Because the creditor has no control over the officer, and also because the debtor has an ample remedy against the officer, the misconduct of the latter in charging illegal fees is not treated as fatal to the extent.<sup>183</sup> "It has been repeatedly held that a levy is not to be avoided because the officer has taxed, and caused to be satisfied in the extent, fees not authorized by law. The officer in such case is liable to the debtor, but the levy is held valid. The creditor is not to suffer by reason of such extortion on the part of the officer."<sup>184</sup>

In Maine, "when, by an error of the officer in a levy already made, or to be made, the amount for which it was made exceeds the amount of debt or damage, costs, interest, and cost of levy by a sum not greater than one per cent of said amount, such levy shall be legal and valid, if otherwise legally made; and the debtor or owner of the estate may maintain an action against such officer or his principal to recover any

<sup>183</sup> *Sturdivant v. Frothingham*, 10 Me. 100; *Keen v. Briggs*, 46 Me. 467.

<sup>184</sup> *Wilson v. Gammon*, 54 Me. 384; *Holmes v. Hall*, 4 Met. 419; *Avery v. Bowman*, 40 N. H. 457, 77 Am. Dec. 728; *Ordiorne v. Mason*, 9 N. H. 24; *Eastman v. Curtis*, 4 Vt. 616; *Burnham v. Aiken*, 6 N. H. 306. In Connecticut, the charging of illegal fees was held to avoid the extent (*Beach v. Walker*, 6 Conn. 197); but the rule is now otherwise by statute. Gen. Stats. Conn., 1888, § 1180; *Camp v. Bates*, 13 Conn. 7.

damages occasioned thereby, or a bill in equity against the creditor to have such error corrected, and the court may correct it in any manner that may be just and equitable or decree a pecuniary compensation for the injury.”<sup>185</sup> In New Hampshire, “when the amount for which real estate is set off is, by accident or mistake in computing the amount of the debt, or damages and costs, with interest thereon, or the officer’s fees on the execution, and without fraudulent intent, greater than the amount due upon such execution, with costs and the officer’s fees, the debtor or person having the estate may redeem by paying or tendering the amount justly due, instead of the amount at which said estate was set off.”<sup>186</sup> “When real estate is set off for a greater amount than is due, either party may apply by petition to the supreme court to have the amount of such excess determined, and, upon notice and hearing, the court shall determine the same, and may issue execution therefor in favor of the debtor, against the creditor. Upon payment of such excess, with interest from the time of the levy, and such costs as the court may allow, the title to said real estate under said levy shall not be affected by such excess.”<sup>187</sup>

**§ 382. Execution Against Equities of Redemption.—**In Connecticut, “whenever the debtor in an execution shall be the owner of the whole or any part of an equity of redemption in a mortgage of both real and personal estate, the creditor in such execution may cause the same to be levied upon the interest of the

<sup>185</sup> Rev. Stats. Me., 1883, p. 617, § 23.

<sup>186</sup> Gen. Laws N. H., 1878, p. 549, § 14.

<sup>187</sup> Gen. Laws N. H., 1878, p. 549, §§ 17, 18.

debtor, in both said real and personal estate; and such interest shall be appraised, and the whole or any part thereof may be set off to the creditor in payment or satisfaction of such execution; and the appraisers shall be appointed, and all other proceedings shall be had in the same manner as is, or shall be, by law provided for the levy of executions upon real estate.”<sup>188</sup> The statute also makes special provision for extending equities of redemption when the real estate is situate in different towns or counties.<sup>189</sup> Lands subject to mortgage when the levy is made may cease to be so subject before the extent is completed. The creditor may determine his mode of procedure by the state of the record title when the levy is made,<sup>190</sup> and cannot be prejudiced by subsequent releases,<sup>191</sup> nor by subsequent alienations. An extent made subject to a mortgage is valid, though it is afterward ascertained that the mortgage was made to defraud creditors, and is therefore, as against them, void.<sup>192</sup> Where the equity of redemption is found to be more than sufficient to satisfy the writ, a part cannot be set off by metes and bounds, but the creditor must be assigned an undivided portion.<sup>193</sup> The mortgagee can never be compelled to accept a partial payment of his debt. If the creditor is assigned an undivided portion of an equity of re-

<sup>188</sup> Stats. of Conn., Rev. of 1888, § 1185.

<sup>189</sup> Stats. of Conn., Rev. of 1888, § 1188.

<sup>190</sup> *Capen v. Doty*, 13 Allen, 262; *Bagley v. Bailey*, 16 Me. 151. But in Massachusetts, if, before levy, the mortgage has been paid, a sale of the equity is void, although the creditor had neither actual nor constructive notice of the payment. *Grover v. Flye*, 5 Allen, 543.

<sup>191</sup> *Smith v. Starkweather*, 5 Day, 207.

<sup>192</sup> *Lord v. Sill*, 23 Conn. 319. See *Brown v. Snell*, 46 Me. 490.

<sup>193</sup> *Hobart v. Frisbie*, 5 Conn. 592; *Swift v. Dean*, 11 Vt. 323. 34 Am. Dec. 693.



demption, he must redeem by paying the whole debt; but he can compel his cotenants to reimburse him for the amount paid to redeem their share.<sup>194</sup> The mortgage may embrace two or more distinct parcels of real estate. The creditor's extent must, in Massachusetts,<sup>195</sup> embrace a portion of every parcel; or if the creditor elects to sell the mortgaged premises, instead of having them appraised and set off to him, the sale must include all the lands embraced in the mortgage,<sup>196</sup> unless the mortgagor has by his voluntary sale divided them into separate parcels.<sup>197</sup> In other states, it may include but one; but even in these states the creditor can make no redemption without paying the entire debt.<sup>198</sup>

In Maine, "levies may be made on lands mortgaged as on lands not mortgaged, and the amount due on the mortgage deducted by the appraisers from their estimated value, and stated in their return. If the full amount due was not deducted, or if the levy was made in the usual form, and it is ascertained that there was a mortgage on the premises not including other real estate, and not known to the creditor at the time of the levy, that shall be valid, and the creditor may recover of the debtor the amount which should have been and was not deducted, or the amount due on such mortgage." <sup>199</sup> The statute of the same state also pro-

<sup>194</sup> *Young v. Williams*, 17 Conn. 393.

<sup>195</sup> *Johnson v. Stevens*, 7 Cush. 435; *Webster v. Foster*, 15 Gray, 31. Lands, part of which are encumbered, and part free from encumbrances, may be embraced in the same extent. *Hannum v. Tourtellott*, 10 Allen, 494; *Wadsworth v. Williams*, 97 Mass. 339.

<sup>196</sup> *Plimpton v. Goodell*, 143 Mass. 367; *Cochran v. Goodell*, 131 Mass. 464.

<sup>197</sup> *North v. Dearborn*, 146 Mass. 17.

<sup>198</sup> *Franklin v. Gorham*, 2 Day, 149, 2 Am. Dec. 86; *Franklin Bank v. Blossom*, 23 Me. 546.

<sup>199</sup> Rev. Stats. Me., 1883, p. 618, § 30.

vides that "rights of redeeming real estate mortgaged, rights to have a conveyance of it by bond or contract, interests by virtue of possession and improvement of lands and estates for a term of years, may be taken on execution and sold."<sup>200</sup> In Massachusetts the equitable right of a debtor to redeem from an absolute conveyance, made in good faith, but by way of security, cannot be taken on execution unless the land is held "on a trust for him whereby he is entitled to a present conveyance" within the meaning of the statute.<sup>201</sup> If a mortgage is believed to be fraudulent, the creditor may proceed in either of two modes; he may disregard the mortgage, or he may treat it as valid and have its amount deducted from the appraised value of the realty. If he pursues this last method, he cannot afterward contest the validity of the mortgage.<sup>202</sup> It is obvious that if a creditor were to extend an execution upon real estate, without taking any notice of an existing mortgage, he would be thereby damnified in the amount of the mortgage, while the debtor would be benefited in a like amount. Hence, it would seem to be very inequitable to permit the debtor to avoid the extent on account of an omission which operated to his advantage. In Connecticut, however, this permission has been given, and, through an undue regard for the forms prescribed by statute, it was held that an extent upon lands as unencumbered could not transfer the title or equity of redemption in mortgaged realty.<sup>203</sup> In Maine and Massachusetts, the rule is the

<sup>200</sup> Rev. Stats. Me., 1883, p. 618, § 32.

<sup>201</sup> Rawson v. Plaisted, 151 Mass. 71.

<sup>202</sup> Brown v. Snell, 46 Me. 490; Adams v. Barnes, 17 Mass. 365; Russell v. Dudley, 3 Met. 147; Bullard v. Hinkley, 6 Greenl. 289, 20 Am. Dec. 304.

<sup>203</sup> Scripture v. Johnson, 3 Conn. 218.

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<sup>203</sup> Scripture v. Johnson, 3 Conn. 213.

other way. "As it sometimes may happen that mortgages may exist without the knowledge of the creditor, or that he may not know whether they are genuine or fictitious, or may suppose that the encumbrances have been removed, or may desire to contest them on the ground of fraud or collusion, it has been holden that he may extend his execution upon the whole estate by an appraisal of its full value. Such a levy will pass all the debtor's interest, whatever it may be."<sup>204</sup> A sale or extent of an equity of redemption, when there was no mortgage at the date of the levy, is void.<sup>205</sup> Each equity of redemption must be separately sold. A sale of two or more distinct equities for one sum is void.<sup>206</sup> But a sale upon execution of a right in equity to redeem a parcel of real estate on which there are two or more mortgages, at the same time and for a gross sum, is not illegal or void. In placing this limitation upon the application of the previously established rule, the Maine supreme court discussed the reason of the rule and said: "The reasons are good and sufficient, and if the right which a debtor has to redeem from several mortgages of the same parcel of property really constitutes as many equities of redemption in him as there are mortgages, it is clear they should be separately sold. But every successive mortgage of the same parcel of real estate conveys from the mortgagor

<sup>204</sup> *Litchfield v. Cudworth*, 15 Pick. 27; *Warren v. Childs*, 11 Mass. 222; *Root v. Colton*, 1 Met. 345; *White v. Bond*, 16 Mass. 400; *Brown v. Clifford*, 38 Me. 210; *Mechanics' Bank v. Williams*, 17 Pick. 438; *Hovey v. Bartlett*, 34 N. H. 278; *Cowles v. Dickinson*, 140 Mass. 373; *Pettee v. Peppard*, 125 Mass. 66.

<sup>205</sup> *Hackett v. Buck*, 128 Mass. 369; *Pillsbury v. Smyth*, 25 Me. 427.

<sup>206</sup> *Stone v. Bartlett*, 46 Me. 438; *Chapman v. Androscoggin R. Co.*, 54 Me. 163; *Smith v. Dow*, 51 Me. 21; *Fletcher v. Stone*, 3 Pick. 250; *McCone v. Courser*, 64 N. H. 506.

the right which he before had, subject to the right of redemption thereby created, so that, let the number of mortgages be what it may, the only substantial existing right in equity which the debtor has is the right to redeem from the last of the series, and (upon the exercise of that right) from the next, under the right to which he is restored by the act of redeeming it from the encumbrance which he had imposed upon it, and so on in their order, to the first. . . . The successive equities are not absolutely distinct, but depend upon each other like the links in a chain. . . . Thus, the reasons assigned for requiring separate sales where the mortgaged property is in whole or in part not identical do not apply.”<sup>207</sup> If an equity of redemption is attached, and before the levy of the execution the mortgage is released, the latter may then be levied on the mortgaged premises in fee.<sup>208</sup> In Maine, an equity of redemption cannot be sold under two or more executions at the same time. Such a sale is void.<sup>209</sup> In Massachusetts, “when any rights of redeeming mortgaged lands are taken and set off on execution, the appraisers shall deduct the value of the encumbrance, or the amount of the mortgage debt, when known, from the estimated value of the premises, and the sum so deducted shall be stated in the return of the execution. If, after an execution is levied in the common form, there proves to be a mortgage or other lien on

<sup>207</sup> *Bartlett v. Stearnes*, 73 Me. 17; followed in *Hobart v. Bennett*, 77 Me. 401.

<sup>208</sup> *Jewett v. Whitney*, 43 Me. 242.

<sup>209</sup> *Chapman v. Androscoggin Co.*, 54 Me. 160. See further, with regard to sales of equities of redemption in Maine, *Abbott v. Sturtevant*, 30 Me. 40; *Grosvenor v. Little*, 7 Me. 376; *Franklin Bank v. Blossom*, 23 Me. 546; *Bailey v. Myrick*, 50 Me. 171; *Stewart v. Crosby*, 50 Me. 130; *Stinson v. Ross*, 51 Me. 556, 81 Am. Dec. 591.

the premises, or an estate of homestead therein, not known or allowed for, or not fully allowed for, by the appraisers, the creditor, shall, nevertheless, be entitled to hold, by force of the execution, the premises, except the estate of homestead, as against the debtor, and may recover, in a new action against the debtor, the amount of the homestead estate, and the amount he shall lawfully pay on account of such mortgage or other lien, or so much thereof as has not been deducted and allowed for in the estimate of the appraisers.”<sup>210</sup>

The statute of the same state also allows the debtor to elect whether he will have the equity of redemption extended or sold, and points out the manner in which the sale may be consummated in case it is preferred.<sup>211</sup> When allowance is made for a nonexistent encumbrance or estate, the extent is invalid.<sup>212</sup> The same rule has been applied where the encumbrance, though existing and valid, was materially overestimated by the appraisers.<sup>213</sup> A party levying an execution upon an equity of redemption is bound by the action of the appraisers as to the amount and validity of a prior encumbrance.<sup>214</sup> In Massachusetts, the appraisers may regard the right of the debtor's wife to dower as an encumbrance, and deduct its estimated value from the appraisement.<sup>215</sup> In New Hampshire, “rights in

<sup>210</sup> Pub. Stats. Mass., 1882, pp. 1009, 1015, §§ 11, 50.

<sup>211</sup> Id., pp. 1011, 1012, §§ 27-30.

<sup>212</sup> Root v. Colton, 1 Met. 345; Whithed v. Mallory, 4 Cush. 138; Barnard v. Fisher, 7 Mass. 71; Brown v. Worcester Bank, 8 Met. 47; Grover v. Flye, 5 Allen, 543. In this case, a sale of the equity was avoided, because, before the levy, the mortgage had been paid, although neither the creditor nor the officer had any actual or constructive notice of the payment.

<sup>213</sup> McGregor v. Williams, 10 Cush. 526.

<sup>214</sup> Waterman v. Curtis, 26 Conn. 241.

<sup>215</sup> Jenks v. Ward, 4 Met. 404. In regard to sales of equities of redemption in Massachusetts, see Houghton v. Field, 2 Cush. 141;

equity of redeeming mortgaged real estate," "the right of any debtor to receive a conveyance of real estate, in performance of any contract," "the right of any debtor to redeem any right or interest in real estate," and "terms for years" in real estate, may all be sold under execution.<sup>216</sup> In Vermont, "when an execution shall be extended on the debtor's right in equity of redeeming real estate mortgaged, it shall be the duty of the appraisers to state the mortgages thereon, and the sums then due and growing due on such mortgages, which shall be stated in the officer's return on the execution, and the creditor in the execution shall have the same right and power of redeeming such real estate, and procuring a discharge of such mortgages, as the original mortgagor might have had or done. If such right in equity shall be appraised at a sum exceeding the amount of the execution and all legal costs thereon, the officer shall set off such an undivided part of such estate as will be sufficient to satisfy such execution and all legal charges thereon."<sup>217</sup> An equity

*Perry v. Perry*, 2 Gray, 326; *Bacon v. Leonard*, 4 Pick. 277; *Whitaker v. Sumner*, 7 Pick. 551, 19 Am. Dec. 298; *Welsh v. Joy*, 13 Pick. 477; *Dow v. Lewis*, 4 Gray, 468; *De Witt v. Harvey*, 4 Gray, 486; *Houghton v. Bartholomew*, 10 Met. 138; *Pease v. Bancroft*, 5 Met. 90; *Rates v. Willard*, 10 Met. 62; *Pomeroy v. Winslip*, 12 Mass. 513, 7 Am. Dec. 91; *Atkins v. Sawyer*, 1 Pick. 351, 11 Am. Dec. 188; *Thayer v. Felt*, 4 Pick. 353; *Bigelow v. Wilson*, 1 Pick. 485; *Whiting v. Hadley*, 3 Allen, 357; *Nichols v. Dewey*, 4 Allen, 386; *Verry v. Richardson*, 5 Allen, 107; *Swan v. Stephens*, 90 Mass. 7; *Lafin v. Crosby*, 99 Mass. 446; *Sanborn v. Chamberlain*, 101 Mass. 409.

<sup>216</sup> Gen. Laws N. H., 1878, pp. 550, 551, §§ 1, 11, 12, 13. With reference to sales in this state, see *Rice v. Smith*, 18 N. H. 369; *Pike v. Clark*, 40 N. H. 9; *Russell v. Dyer*, 40 N. H. 173; 43 N. H. 396; *Derry Bank v. Webster*, 44 N. H. 264; *Riddle v. Fellows*, 42 N. H. 309; *Russell v. Fabyan*, 34 N. H. 218.

<sup>217</sup> Rev. Laws Vt., 1880, §§ 1585, 1586; *Collins v. Gibson*, 5 Vt. 243; *Slocum v. Catlin*, 22 Vt. 137; *Hulett v. Soullard*, 26 Vt. 295; *Morgan v. Armington*, 33 Vt. 13.



of redemption which has been fraudulently conveyed may be levied upon as though such conveyance had not been made.<sup>218</sup> A sale under execution of an equity of redemption is void when made to the debtor's wife,<sup>219</sup> unless there is some statute giving her powers denied her by the common law. Where lands are apparently subject to two mortgages, and a sale is made "of the right in equity" of the defendant, it has been held that the purchaser may contest the validity of the second mortgage.<sup>220</sup> Where simultaneous levies by attachment are made, the creditors take by moieties to the extent of their respective claims.<sup>221</sup> An extent or sale is not invalid because one of the parcels of land did not belong to the defendant.<sup>222</sup> Upon the sale of an equity of redemption, the purchaser succeeds to the rights of the mortgagor, and is, therefore, entitled to possession of the property, and to redeem it from the mortgagee.<sup>223</sup> Similarly, the extent of an execution upon a fractional part of an equity of redemption gives the creditor such an interest in the premises as to entitle him to redeem.<sup>224</sup>

**§ 383. Delivering Seisin to the Creditor.**—By the statute of Maine, "the officer is to deliver to the creditor, or his attorney, seisin and possession of an estate levied on, so far as the nature of the estate and the title of the debtor will admit. When a remainder, re-

<sup>218</sup> *Livermore v. Boutelle*, 11 Gray, 217, 71 Am. Dec. 708.

<sup>219</sup> *Stetson v. O'Sullivan*, 8 Allen, 821.

<sup>220</sup> *Stebbins v. Miller*, 12 Allen, 591.

<sup>221</sup> *Sigourney v. Eaton*, 14 Pick. 414, 25 Am. Dec. 414; *Perry v. Adams*, 3 Met. 54.

<sup>222</sup> *Buffum v. Deane*, 8 Cush. 36.

<sup>223</sup> *Wellington v. Gale*, 7 Mass. 138; *Porter v. Millet*, 9 Mass. 101; *Devereaux v. Fairbanks*, 52 Vt. 587.

<sup>224</sup> *Wheeler v. Willard*, 44 Vt. 640.

version, or right of redemption is taken, the debtor in possession is not to be ousted, but his right therein assigned to the creditor, and a return made accordingly.”<sup>225</sup> The delivery of seisin, when received by the creditor, is a final and irrevocable acceptance of the extent, unless the property did not belong to the defendant, or was not subject to execution, or cannot be held by the levy.<sup>226</sup> But the creditor, from any cause which he may deem sufficient, may refuse to accept the seisin proffered him by the officer. The officer should return this fact upon his writ. The extent is thereby waived and set at naught, the execution stands unsatisfied, and an alias writ may properly issue after the return of the original.<sup>227</sup>

Neglect of the creditor for a month after seizure and appraisement to receive seisin is an unreasonable delay amounting to a waiver of the lien obtained by the levy. An intermediate conveyance by the judgment debtor avoids the levy.<sup>228</sup>

The statute of Massachusetts, in reference to the delivery of seisin by the officer, is in substantial conformity with that of Maine, except that it contains an additional provision authorizing the officer to deliver a momentary seisin of lands extended, but not in the possession of the defendant.<sup>229</sup> “But the lands of the debtor cannot be taken, unless by the acceptance of the creditor; and, until this delivery of seisin, the title

<sup>225</sup> Rev. Stats. Me., 1883, p. 615, § 13; *Wilson v. Gannon*, 54 Me. 384.

<sup>226</sup> *Pope v. Cutler*, 22 Me. 105; *Gorham v. Blazo*, 2 Me. 232; *Bott v. Burnell*, 91 Mass. 96.

<sup>227</sup> *Darling v. Rollins*, 18 Me. 405; *Jackson v. Woodman*, 29 Me. 266; *Bingham v. Smith*, 64 Me. 450.

<sup>228</sup> *Waterhouse v. Waite*, 11 Mass. 207.

<sup>229</sup> Pub. Stats. Mass., 1882, p. 1010, §§ 20, 21.

of the debtor is not affected.”<sup>230</sup> Seisin may be delivered to the creditor’s attorney.<sup>231</sup> It has never been considered necessary that the attorney to whom seisin is delivered by the sheriff, when he extends an execution upon real estate, according to the statute, should be regularly constituted attorney by deed. On the contrary, it was decided some years since by this court, before the commencement of our reports, that the attorney of record under whose management the judgment had been recovered, might, without any further authority, receive seisin for the creditor. Neither do we see any reason why any person undertaking to act in this respect for the creditor may not be legally considered his attorney for this purpose, if he have the previous request of the creditor or his subsequent ratification. That assent or ratification will be presumed, unless the creditor shall, within a reasonable time after notice of the transaction, disaffirm the doings of the person assuming to act as his attorney.<sup>232</sup> A return that the officer delivered possession to the creditor will be treated as equivalent to a return that he delivered seisin.<sup>233</sup>

In New Hampshire, a creditor’s subsequent conveyance, with warranty, of land acquired by levy is regarded as sufficient evidence of the acceptance of seisin by him.<sup>234</sup>

After seisin is accepted, and before the writ is returned and recorded, the creditor may, in Massachusetts, waive the extent, if “it appears that there is a defect or error in the proceedings that would defeat

<sup>230</sup> Ladd v. Blunt, 4 Mass. 403.

<sup>231</sup> Herring v. Polley, 8 Mass. 113.

<sup>232</sup> Pratt v. Putnam, 13 Mass. 363.

<sup>233</sup> Boylston v. Carver, 11 Mass. 515.

<sup>234</sup> Marston v. Osgood, 38 Atl. 378.

and render void the levy, or that the estate levied upon cannot for any reason be held thereby.”<sup>235</sup> In New Hampshire, the statute simply provides that “the officer shall deliver seisin and possession of the property so set off, to the creditor or his attorney.”<sup>236</sup> It is sufficient that seisin be delivered to one of two joint judgment creditors.<sup>237</sup> In the statutes of Vermont, we find no provision requiring the officer to deliver seisin, except in certain cases where an extent is made on rents, issues, and profits of real estate, which has been leased for life, for years, or perpetually.<sup>238</sup>

§ 384. The Officer's Return is evidence of the various facts required to establish the existence of a valid extent. It should, therefore, directly or by necessary implication, affirm the existence of all of those facts. If it is wanting in this respect, the extent is invalid.<sup>239</sup> In Connecticut, the statute has not attempted to prescribe any form to be pursued by the officer in making his return, but has been content with the general direction that the officer shall cause such execution, “with his indorsement thereon of such appraisal and his proceedings, to be recorded at length.”<sup>240</sup> The decisions of this state have established the following rules: That certainty to a common intent is sufficient, and that the court will look on the return with the eyes of common sense, and apply to it the rules of construc-

<sup>235</sup> Pub. Stats. Mass., 1882, p. 1015, § 52.

<sup>236</sup> Gen. Laws N. H., 1878, p. 548, § 11.

<sup>237</sup> *Smith v. Smith*, 11 N. H. 459.

<sup>238</sup> Rev. Laws Vt., 1880, § 1588.

<sup>239</sup> *Fitch v. Smith*, 9 Conn. 42; *Mather v. Chapman*, 6 Conn. 57; *Shields v. Hastings*, 10 Cush. 247; *Avery v. Bowman*, 39 N. H. 393; *Sleeper v. Newbury Seminary*, 19 Vt. 451; *Walsh v. Anderson*, 135 Mass. 65.

<sup>240</sup> Gen. Stats. Conn., 1888, § 1184.

tion applicable to other instruments;<sup>241</sup> that where the return admits of different constructions, that will be preferred which accords with the law;<sup>242</sup> that a manifest error, which may be rejected and leave the return sufficient, may be treated as surplusage;<sup>243</sup> that the certificate of the appraisers, annexed to or incorporated in the return, must be regarded as a part thereof;<sup>244</sup> that a return that the defendant's right, title, and interest in the land was set off, is equivalent to a return saying that the land was set off;<sup>245</sup> that "it is not necessary that the officer use technical precision in describing the acts performed by him; it will be sufficient if it appears by reasonable construction of the whole return, or by necessary inference from the facts therein stated, that everything required by statute to constitute a valid levy has been performed";<sup>246</sup> that the officer's return need not and ought not to state that it has been recorded, because it is required to be complete before being filed for record, and the officer should certify to antecedent, and not to subsequent, acts.<sup>247</sup>

The statute of Maine requires that "the officer shall, in his return on the execution, state substantially the time when the land was taken in execution; how the appraisers were appointed; that they were duly sworn;

<sup>241</sup> *Peck v. Wallace*, 9 Conn. 453; *Coe v. Wickham*, 83 Conn. 389; *Johnson v. Huntington*, 13 Conn. 52; *Corbett v. M. & U. Bank*, 53 Me. 542.

<sup>242</sup> *Whittlesey v. Starr*, 8 Conn. 134.

<sup>243</sup> *Jessup v. Batterson*, 5 Day, 368.

<sup>244</sup> *Jackson v. Huntington*, 13 Conn. 52; *Booth v. Booth*, 7 Conn. 350.

<sup>245</sup> *Booth v. Booth*, 7 Conn. 350.

<sup>246</sup> *Bissel v. Nooney*, 38 Conn. 418; *Brace v. Catlin*, 7 Conn. 361, note; *Backus v. Danforth*, 10 Conn. 297; *Brackett v. McKenney*, 55 Me. 504.

<sup>247</sup> *Finch v. Bishop*, 13 Conn. 576; *Willard v. Whipple*, 40 Vt. 219.

that they appraised and set off the premises, after viewing the same, at the price specified; that he delivered seisin and possession to the creditor or his attorney, or assigned the same to him as in case of remainder or other incorporeal estate; the description of the premises by himself or by reference to the return of the appraisers; if the appraisers' return is signed by two only, he must state whether all were present and acted. He may refer to and adopt in his return the return of the appraisers, and the subsequent proceedings will be valid, though made after the return day of the execution, or after the removal or disability of the officer."<sup>248</sup> In this state a return is construed in the same manner as a deed;<sup>249</sup> it must show that the defendant was notified to choose an appraiser;<sup>250</sup> by whom the appraisers were chosen;<sup>251</sup> why an undivided portion of the premises was set off, instead of a part by metes and bounds;<sup>252</sup> that the premises were shown to the appraisers;<sup>253</sup> that seisin was delivered by the officer to the creditor.<sup>254</sup> If there is a postponement of sale the officer's return should affirm the advisability thereof and the giving of proper notice.<sup>255</sup> Where the papers clearly show that the person who acted as appraiser was the same person who was chosen and sworn, a clerical error in the initial letter of his middle name in the officer's re-

<sup>248</sup> Rev. Stats. Me., 1883, p. 614, § 5.

<sup>249</sup> *Waterhouse v. Gibson*, 4 Me. 230.

<sup>250</sup> *Means v. Osgood*, 7 Greenl. 146; *Ware v. Barker*, 49 Me. 358.

<sup>251</sup> *Banister v. Higginson*, 15 Me. 73, 32 Am. Dec. 134.

<sup>252</sup> *Merrill v. Burbank*, 23 Me. 538; *Henry v. Tilson*, 19 Vt. 447; *Edwards v. Allen*, 27 Vt. 381; *Morgan v. Armington*, 33 Vt. 13.

<sup>253</sup> *Huntress v. Tiney*, 39 Me. 237.

<sup>254</sup> *Darling v. Rollins*, 18 Me. 405; *Pope v. Cutler*, 22 Me. 105; *Jackson v. Woodman*, 29 Me. 266.

<sup>255</sup> *Wilson v. Bucknam*, 71 Me. 545.

turn will not invalidate the levy.<sup>256</sup> The return need not name the magistrate by whom the appraisers were sworn.<sup>257</sup> If the officer's return is undated it is presumed to refer to the date of appraisement.<sup>258</sup>

It is sufficient for the return to state that the property was appraised at a sum "which is the amount of the execution, fees, and charges," because this amount may be ascertained from inspecting the writ and the indorsements thereon.<sup>259</sup> The provisions of the statutes of Massachusetts on this subject are as follows: "The officer, in the return or certificate of his doings indorsed on the execution, shall set forth substantially the following facts and circumstances, to wit: 1. The time when the premises were taken on execution;<sup>260</sup> 2. That the appraisers were appointed by himself and the creditor and debtor; or that the debtor was absent from or not resident in this state, and had no agent or attorney known to the officer, or neglected to appoint an appraiser, and the officer appointed one for him, as the case may be;<sup>261</sup> 3. That the appraisers were duly sworn, unless a certificate of the oath is indorsed on the execution, and signed by the justice or officer who administered it;<sup>262</sup> 4. That they appraised and set off the premises at the price specified; 5. That the officer delivered seisin thereof to the creditor, or some person as his attorney, or assigned the same to him as prescribed in the case of a remainder or incor-

<sup>256</sup> Hall v. Staples, 74 Me. 178.

<sup>257</sup> Dodge v. Farnsworth, 19 Me. 278.

<sup>258</sup> Gorham v. Blazo, 2 Me. 232.

<sup>259</sup> Keen v. Briggs, 46 Me. 467.

<sup>260</sup> Childs v. Barrows, 9 Met. 413; Cowls v. Hastings, 9 Met. 476.

<sup>261</sup> Eddy v. Knap, 2 Mass. 154; Leonard v. Bryant, 2 Cush. 32; Bradley v. Bassett, 2 Cush. 417.

<sup>262</sup> Leonard v. Bryant, 2 Cush. 32.

poreal estate;<sup>263</sup> 6. The description of the premises, unless they are sufficiently described in the certificate of the appraisers, in which case the officer may refer to and adopt that description;<sup>264</sup> and 7. If the appraisement is signed by only two of the appraisers, the return shall show that all three were present and acted therein.<sup>265</sup>

Under this statute, a return need not show that the appraisers resided in the county or state;<sup>266</sup> nor which of the appraisers was appointed by the officer on behalf of the debtor;<sup>267</sup> nor that the creditor elected to have an equity of redemption sold, instead of extended.<sup>268</sup> A return stating that the defendant was duly notified, and neglected to appoint an appraiser, shows that reasonable notice to make such appointment was given.<sup>269</sup> The statute of New Hampshire requires the officer to "make a full return of his proceedings,"<sup>270</sup> but gives no special directions concerning the form or contents of the return. "It is well settled in this state that an officer's return of the levy of an execution upon real estate must state expressly every fact essential to the validity thereof by statute, or that every such fact must be necessarily implied in what is stated, in order to make the levy effectual to pass the title to the property levied on."<sup>271</sup> The return need not, in this state, show that the levy was

<sup>263</sup> *Waterhouse v. Waite*, 11 Mass. 207; *Pratt v. Putnam*, 18 Mass. 361.

<sup>264</sup> *Tate v. Anderson*, 9 Mass. 92; *Bates v. Willard*, 10 Met. 62.

<sup>265</sup> Pub. Stats. Mass., 1882, p. 1011, § 24.

<sup>266</sup> *Campbell v. Webster*, 15 Gray, 28.

<sup>267</sup> *Dooley v. Wolcott*, 4 Allen, 406.

<sup>268</sup> *Sanborn v. Chamberlin*, 101 Mass. 409.

<sup>269</sup> *Ufford v. Dickerson*, 12 Allen, 543.

<sup>270</sup> Gen. Laws N. H., 1878, p. 548, § 11.

<sup>271</sup> *Avery v. Bowman*, 39 N. H. 395; *Mead v. Harvey*, 2 N. H. 498.



made by the direction of the creditor;<sup>272</sup> nor that the land had previously been attached on mesne process.<sup>273</sup> But it must state that the appraisers were residents of the county,<sup>274</sup> and that the defendant whose land was taken was notified to select an appraiser.<sup>275</sup> In Vermont, the statute does not prescribe the form nor the contents of the return. At an early day, a form prepared and published by Judge Chipman came into general use, and was upheld by the courts.<sup>276</sup> The return of the officer, as well as every other act necessary to sustain the extent, must, in Vermont, be completed before or on the return day of the writ.

<sup>272</sup> *Smith v. Smith*, 11 N. H. 459.

<sup>273</sup> *Derry Bank v. Webster*, 44 N. H. 264.

<sup>274</sup> *Libbey v. Copp*, 3 N. H. 45.

<sup>275</sup> *Whittier v. Varney*, 10 N. H. 291.

<sup>276</sup> *Cleveland v. Allen*, 4 Vt. 176; *Eastman v. Curtis*, 4 Vt. 616; *Chase v. Bowen*, 7 Vt. 431; *Aldis v. Burdick*, 8 Vt. 21. The form referred to is as follows:

"RUTLAND COUNTY, ss. Know all men by these presents, that I, J. B., sheriff of the county of Rutland, by virtue of the within writ of execution to me directed, and by direction of J. W., the creditor within named, did at —, in said county, on the — day of —, in the year of our Lord —, levy the said writ of execution on a certain tract or parcel of land, shown to me by said J. W. as the property of B. G., the within-named debtor, situate, lying, and being in — aforesaid, and bounded as follows, to wit: Beginning [here insert the bounds of the land as set off], and afterward, to wit, at — aforesaid, on the day and year last aforesaid I caused the same land with the appurtenances thereof to be appraised by P. P., I. N., and I. S., good and lawful freeholders of the vicinity, chosen, appointed, and sworn as the law directs, who, on their oaths, have appraised the same at the sum of £40 10s. 5d. lawful money, to full satisfaction of the within writ of execution and legal cost thereon arising, as stated in the bill hereto annexed, and on the same day of —, in the year of our Lord —, I delivered possession of the above-described premises to the said J. W. and caused him to become seised thereof. In witness whereof, I have hereunto subscribed my name and affixed my seal the day and year above contained. J. B." (Reports and Dissertations, by Nathaniel Chipman, p. 264.)

Otherwise the extent is void.<sup>277</sup> "The return of the officer, as to all matters which are properly the subject of his return, is conclusive so far as it affects parties and privies to the process returned."<sup>278</sup> A return affirming the existence of a homestead is conclusive of such fact at the trial as against the allegation of a party or his counsel that no such right existed.<sup>279</sup> A schoolhouse upon which notice was posted is sufficiently shown to be a "public place" by an affirmation of such fact in the officer's return.<sup>280</sup>

**§ 385. Describing the Property.**—Either in the return of the officer, or in the certificate of the appraisers, the property taken must be described by metes and bounds, or by some other sufficient means of designation. We have already considered the question of description in connection with levies under execution, where the levy is to be succeeded by a sale and conveyance of the property.<sup>281</sup> The rules there stated and the authorities there cited seem to be equally applicable where the question of description is to be considered in connection with an extent of the debtor's real estate. If, from the terms used in the description, the property cannot be ascertained, the extent is undoubtedly void. But, on the other hand, any description by which the bounds of the property may be determined is sufficient.<sup>282</sup> Nor is it essential that

<sup>277</sup> *Hall v. Hall*, 5 Vt. 304; *Downer v. Hazen*, 10 Vt. 418; *Morton v. Edwin*, 19 Vt. 77; *Russell v. Brooks*, 27 Vt. 640; *Perrin v. Reed*, 33 Vt. 62; *Little v. Sleeper*, 37 Vt. 105, 86 Am. Dec. 697.

<sup>278</sup> *Baker v. Baker*, 125 Mass. 7.

<sup>279</sup> *Whitefield v. Adams*, 65 Vt. 632.

<sup>280</sup> *Wilson v. Bucknam*, 71 Me. 545.

<sup>281</sup> *Ante*, § 281.

<sup>282</sup> *Lyford v. Thurston*, 16 N. H. 400; *Colburn v. Pomeroy*, 44 N. H. 19; *Hedge v. Drew*, 12 Pick. 141, 22 Am. Dec. 416; *Morse v. Dewey*, 3 N. H. 535; *Saunders v. First Nat. Bank*, 61 N. H. 31.

this determination should be capable of being correctly made from a mere inspection of the description. Parol evidence may be resorted to for the purpose of explaining the meaning of the terms used. If, by the aid of such evidence, the lands may be located, the description is as complete as the law will exact.<sup>283</sup> In cases of doubt, the language is construed against, rather than in favor of, the creditor.<sup>284</sup> It is not fatal to the extent that the terms of the description are in some respects false or contradictory, if, taken altogether, they make it clear what lands are intended.<sup>285</sup> "If the description in the return of the extent be sufficient to show with reasonable certainty what premises were intended to be set off, it will be sufficient, though incorrect and contradictory in some particulars."<sup>286</sup> For the purposes of description, reference may be made to the debtor's deeds,<sup>287</sup> and the description therein contained may be thereby adopted for the purposes of the extent. A tract of land was accurately described, but a reservation was made of "about an acre and a half sold to Abel Wilder." It was held that the court would presume that the sale was evidenced by a conveyance from the debtor to Abel Wilder; that the reservation was in effect a reservation of "about an acre and a half, as described in a deed to Abel Wilder; and, therefore, that the description was not void for uncertainty."<sup>288</sup> A description in the appraiser's cer-

<sup>283</sup> Chappell v. Hunt, 8 Gray, 427.

<sup>284</sup> Young v. McGown, 59 Me. 349.

<sup>285</sup> Forbes v. Hall, 51 Me. 568; Jones v. Buck, 54 Me. 301; Thatcher v. Howland, 2 Met. 41; Johnson v. Simpson, 36 N. H. 91.

<sup>286</sup> Vogt v. Ticknor, 48 N. H. 249.

<sup>287</sup> Cowan v. Wheeler, 81 Me. 439; Boylston v. Carver, 11 Mass. 515; Jenks v. Ward, 4 Met. 404; Hyde v. Barney, 17 Vt. 280, 44 Am. Dec. 335; Maeck v. Sinclair, 10 Vt. 103.

<sup>288</sup> Gilman v. Thompson, 11 Vt. 643, 34 Am. Dec. 714.

tificate to the effect that "Tract No. 2 is situated on the corner of Lake and Elm streets" is insufficient.<sup>289</sup>

A statute requiring a description "by metes and bounds" may be satisfied without stating distances, courses and monuments. It is enough that the land may be identified.<sup>290</sup> The lands taken may be described by giving the names of the proprietors of the adjoining lands.<sup>291</sup>

A levy is fatally defective for uncertainty of description where appraisers describe certain premises and set off all except a portion which is only described by giving two of its boundary lines, the officer making the appraisement part of his return.<sup>292</sup>

While parol evidence is competent to assist in the interpretation of the language used in the description, it cannot be employed for the purpose of showing what the officer intended to do,<sup>293</sup> nor for the purpose of changing the operation of terms which are apparently free from ambiguity, and of import so obvious as to be in no need of interpretation. Thus, where the point of commencing "is described as being at a stake at the west corner of certain land, and that corner can be ascertained, parol evidence is inadmissible to prove that in fact the stake referred to stood at a different place."<sup>294</sup> So, where the boundaries of a tract were stated by courses and distances, but no monuments were mentioned by which these courses or distances could be controlled, it was adjudged that parol

<sup>289</sup> *Saunders v. First Nat. Bank*, 61 N. H. 81.

<sup>290</sup> *Rollins v. Mooers*, 25 Me. 192.

<sup>291</sup> *McConihe v. Sawyer*, 12 N. H. 396.

<sup>292</sup> *Stevenson v. Fuller*, 75 Me. 324.

<sup>293</sup> *Young v. McGown*, 59 Me. 349.

<sup>294</sup> *Pride v. Lunt*, 19 Me. 115; *Wiswell v. Marston*, 54 Me. 270; *Moore v. Griffin*, 22 Me. 350; *Wellfleet v. Truro*, 9 Allen, 137; *Crosby v. Parker*, 4 Mass. 110.

evidence could not be received to show an error in one of the courses.<sup>295</sup> Some statutes require that the interest of the debtor in the lands extended be designated. If an officer, acting under such a statute, omits to specify the interest taken, the extent is void.<sup>296</sup> The same result follows where an attempted specification is expressed in terms so vague as to accomplish no useful purpose. Hence a levy upon half of certain designated lands, "reserving and accepting such encumbrances and conveyances as may have been made prior to the levy," is void.<sup>297</sup> Where the return shows that a tract of land has been set off as the property of the debtor, these terms imply that the estate extended was the highest and most extensive known to the law, or, in other words, that it was an estate in possession in fee-simple absolute.<sup>298</sup> The words "an estate in fee" signify an estate in fee-simple, in severalty, and in possession.<sup>299</sup> In Massachusetts, a levy "on an undivided portion of the defendant's inheritance, as appears by the inventory of his father's estate," was declared invalid for uncertainty.<sup>300</sup> If an attempt is made to extend several lots under execution, and some of them are so imperfectly described as not to pass by the extent, this fact will not invalidate the extent as to those lots which are properly described.<sup>301</sup>

<sup>295</sup> *Chadbourn v. Mason*, 48 Me. 389.

<sup>296</sup> *Rawson v. Lowell*, 34 Me. 201. See *Hyde v. Barney*, 17 Vt. 280. 44 Am. Dec. 335; *Stinson v. Rouse*, 52 Me. 261.

<sup>297</sup> *Thayer v. Mayo*, 34 Me. 139.

<sup>298</sup> *Patterson v. Chandler*, 55 Me. 53; *Boynton v. Grant*, 52 Me. 220.

<sup>299</sup> *Brackett v. Riddlon*, 54 Me. 426; *Corbett v. Maine Bank*, 53 Me. 542. It was formerly necessary in Maine to designate the debtor's estate, but it is not so now. *French v. Allen*, 50 Me. 437.

<sup>300</sup> *Tate v. Anderson*, 9 Mass. 92.

<sup>301</sup> *Bates v. Downer*, 4 Vt. 178.

**§ 386. Recording the Writ and Return.**—"The officer" must, under the statute of Connecticut, "cause the execution, with his indorsement thereon of the appraisal and his proceedings, to be recorded at length in the records of the town where the estate lies, and shall then return such execution into the office of the clerk of the court from whence it issued, there to be kept on file."<sup>302</sup> The recording of an instrument upon the public records is generally for the purpose of imparting notice and preserving evidence of an act already consummated. Thus a conveyance of lands becomes operative when it is first delivered to the grantee. This is not necessarily the case with the execution, and the officer's return showing the proceedings had thereunder. Title by extent depends upon a complete compliance with the provisions of this statute. If the statute requires the execution and return to be recorded, then such recording is indispensable to the completeness and validity of the extent, unless the statute shows upon its face that such recordation shall not, in certain cases or between certain parties, be deemed indispensable. In Connecticut the extent is not consummated, nor the debtor's title divested, until the last requirement of the statute has been fulfilled; or, in other words, until the recording has been done, and the writ returned into the office of the clerk of the court.<sup>303</sup> It is incumbent upon the execution creditor, not only to see that due return is made to court, but also to place that under which he claims upon record. Any delay in attending to such recording is at the risk of having his deed postponed

<sup>302</sup> Gen. Stats. Conn., 1888, § 1184.

<sup>303</sup> Kellogg v. Wadhams, 9 Conn. 201; Coe v. Stow, 8 Conn. 535; French v. Gray, 2 Conn. 104; Tapliff v. Davis, 1 Root, 556; Burton v. Pond, 5 Day, 160.

in favor of intervening grantees of the execution debtor.<sup>304</sup>

In Maine, "the officer is to return the execution into the clerk's office where returnable, and, within three months after completing the levy, cause it, with the return thereon, to be recorded in the registry of deeds where the land lies. When not so recorded, the levy will be void against a person who has purchased for a valuable consideration, or has attached or taken on execution the same premises, without actual notice thereof. If the levy is recorded after the three months, it will be valid against a conveyance, attachment, or levy made after such record."<sup>305</sup> If proceedings in seizing, advertising and selling lands have been regular, a delay of more than a year by the officer in returning the execution to the clerk's office will not affect the purchaser's title.<sup>306</sup> When it is sought to charge a subsequently attaching creditor with notice of a prior unrecorded levy, the proof must be exceedingly clear and unequivocal.<sup>307</sup> "The record of the return of the officer without his signature to authenticate it cannot be considered such a record as the statute required to make the levy effectual against subsequent purchasers."<sup>308</sup> In computing the time within which the recording is required to be done, the day of the levy should be excluded.<sup>309</sup> If the proceedings supporting the extent

<sup>304</sup> *Schroeder v. Tomlinson*, 70 Conn. 348.

<sup>305</sup> Rev. Stats. Me., 1883, p. 616, §§ 16, 17; *Boynton v. Grant*, 52 Me. 220; *Hanly v. Sidelinger*, 52 Me. 138; *Balch v. Pattee*, 38 Me. 353; *Pope v. Cutler*, 22 Me. 105; *Stevens v. Bachelder*, 28 Me. 218.

<sup>306</sup> *Caldwell v. Blake*, 69 Me. 458.

<sup>307</sup> *Doe v. Flake*, 17 Me. 249; *McMechan v. Griffin*, 3 Pick. 149, 15 Am. Dec. 198.

<sup>308</sup> *Stevens v. Bachelder*, 28 Me. 231.

<sup>309</sup> *Berry v. Spear*, 13 Me. 187.

are properly recorded, the time when the execution is returned to the clerk's office whence it issued seems to be regarded as immaterial, both in Maine and Massachusetts.<sup>310</sup> The statute of Massachusetts, providing for recording the execution and return, and specifying the persons against whom the extent must be treated as invalid unless such record is made, is substantially like the statute of Maine.<sup>311</sup> In New Hampshire the officer must "make a full return of his proceedings, and cause the execution and return to be recorded at length in the registry of deeds of the county, and returned to the office of the clerk of the court to which it is by law returnable. All the debtor's interest in such real estate shall pass by the levy, as against all persons, if the levy is recorded, as aforesaid, on or before the return day of the execution; otherwise, only as against the debtor and his heirs, until such record is made."<sup>312</sup> In Vermont, all executions extended upon real estate must, with the officer's return thereon, be recorded in the office where deeds of such property are required to be recorded, and also be returned to the office of the clerk of the court or the justice of the peace whence they issued, and be there recorded.<sup>313</sup> In this state, everything required to be done by the officer must be completed within the life of the writ. Hence he cannot make out nor subscribe his return after the return

<sup>310</sup> *Emerson v. Towle*, 5 Me. 167; *Prescott v. Pettee*, 3 Pick. 331.

<sup>311</sup> Pub. Stats. Mass., 1882, p. 1011, §§ 25, 26; *Waterhouse v. Waite*, 11 Mass. 207; *Tobey v. Leonard*, 15 Mass. 200; *McGregor v. Brown*, 5 Pick. 170; *Prescott v. Pettee*, 3 Pick. 331; *McLellan v. Whitney*, 15 Mass. 137; *Houghton v. Bartholomew*, 10 Met. 138; *De Witt v. Harvey*, 4 Gray, 486.

<sup>312</sup> Gen. Laws N. H., 1878, p. 548, §§ 11, 12. At an early day in this state the recording was indispensable to the validity of the extent, as against the debtor. *Sullivan v. McKean*, 1 N. H. 371; *Rand v. Hadlock*, 6 N. H. 514; *Morse v. Carlton*, 7 N. H. 581.

<sup>313</sup> Rev. Laws, Vt., 1880, § 1573; *Willard v. Whipple*, 40 Vt. 219.



day.<sup>314</sup> It is indispensable to the passing of title that the execution and the officer's return be recorded in the office of the town clerk during the life of the writ;<sup>315</sup> but the record in the office of the clerk of the court, or of the justice of the peace, may be made at any time afterward, and before the commencement of the action in which the extent is called in question,<sup>316</sup> provided that the writ was actually returned to such office on or before the return day thereof.<sup>317</sup>

**§ 387. Of Contradicting and Supporting the Officer's Return.**—The return of the officer, as long as it remains in force, is conclusive either of the validity or invalidity of the extent. If it shows the existence of all the essential facts, the extent must be upheld. If it fails to show the existence of some essential fact, the extent must be disregarded. In Connecticut the return is only *prima facie* evidence of the facts therein stated.<sup>318</sup> In each of the other states wherein lands are extended under execution, the rule is otherwise. As between the parties to the writ and their successors in interest, the validity of the extent cannot be assailed by showing that some one or more of the essential facts stated in the return did not in fact exist.<sup>319</sup> Hence it cannot be

<sup>314</sup> Hall v. Hall, 5 Vt. 304; Downer v. Hazen, 10 Vt. 418.

<sup>315</sup> Perrin v. Reed, 33 Vt. 62; Ellison v. Wilson, 36 Vt. 60; Little v. Sleeper, 37 Vt. 105; Willard v. Lull, 20 Vt. 373.

<sup>316</sup> Morton v. Edwin, 19 Vt. 77.

<sup>317</sup> Russell v. Brooks, 27 Vt. 640.

<sup>318</sup> Page v. Green, 6 Conn. 338; Wilkie v. Hall, 15 Conn. 32; Palmer v. Thayer, 28 Conn. 237; Watson v. Watson, 6 Conn. 338.

<sup>319</sup> Bamford v. Melvin, 7 Me. 14; Huntress v. Tiney, 39 Me. 237; Hotchkiss v. Hunt, 56 Me. 252; Bott v. Burnell, 1 Mass. 163; McGough v. Wellington, 6 Allen, 505; Estabrook v. Hapgood, 10 Mass. 313; Whitaker v. Sumner, 7 Pick. 551, 19 Am. Dec. 248; Brown v. Davis, 9 N. H. 76; Ladd v. Wiggin, 35 N. H. 421, 69 Am. Dec. 551; Parker v. Guillo, 10 N. H. 103; Swift v. Cobb, 10 Vt. 282; Hathaway v. Phelps, 2 Aiken, 84; Eastman v. Curtis, 4 Vt. 616.

shown, in opposition to the return, that the appraisers were interested, or indiscreet, or otherwise disqualified from acting;<sup>320</sup> nor that a person described as the agent of the debtor was not, in fact, such agent;<sup>321</sup> nor that seisin was not delivered to the creditor;<sup>322</sup> nor that the appraisers overestimated certain encumbrances;<sup>323</sup> nor that certain buildings were excluded from the estimate made by the appraisers;<sup>324</sup> nor that they were not sworn;<sup>325</sup> nor that the lands extended are not the lands which were appraised.<sup>326</sup> A purchaser of land at an execution sale, whether he be the execution creditor or a stranger, has a right to rely upon the officer's return as conclusive evidence of the facts stated therein. The statement in the return that the officer has given due notice of the intended sale cannot be contradicted.<sup>327</sup> But the return is not conclusive of the existence nor the amount of an alleged encumbrance which the appraisers have deducted from their valuation of the property taken.<sup>328</sup> That defects in a return cannot be supplied by parol evidence is even more universally acknowledged and enforced than that it cannot be contradicted thereby. Every fact requisite for the support of the extent must appear by the record. The record may be silent concerning some material fact.

<sup>320</sup> *Grover v. Howard*, 31 Me. 546; *McKeen v. Gammon*, 33 Me. 187; *Campbell v. Webster*, 15 Gray, 28; *Rollins v. Mooers*, 25 Me. 192.

<sup>321</sup> *Dooley v. Wolcott*, 4 Allen, 406.

<sup>322</sup> *Cowan v. Wheeler*, 31 Me. 439.

<sup>323</sup> *Boody v. York*, 8 Greenl. 272; *Tibbetts v. Merrill*, 12 Me. 122.

<sup>324</sup> *Waterhouse v. Gibson*, 4 Me. 230.

<sup>325</sup> *Dodge v. Farnsworth*, 19 Me. 278.

<sup>326</sup> *Stevens v. Brown*, 3 Vt. 420, 23 Am. Dec. 215.

<sup>327</sup> *Hobart v. Bennett*, 77 Me. 401.

<sup>328</sup> *Hannum v. Tourtellot*, 10 Allen, 494; *McGregor v. Williams*, 10 Cush. 526; *Jenks v. Ward*, 4 Met. 404.

Parol evidence regarding this fact would not tend to contradict the record. Such evidence is nevertheless inadmissible. Unless the deficiency in the record can be supplied by amendment, the extent must fail.<sup>329</sup> We shall in the next section consider when and against whom an amendment of the record may be allowed.

**§ 388. Amendments.**—Until the execution is deposited for record, it is still within the legal power of the officer, and he may make such return as he may deem conformable to the facts. If, before that time, he has in fact written out his return, he may, notwithstanding, amend it without leave of court,<sup>330</sup> and he may also permit the appraisers to amend their certificate.<sup>331</sup> After the execution has been recorded, and has thereby been made a matter of record, it can be amended only by permission of the court. There is no reason why an appraiser's return should not be amendable under like circumstances with an officer's return.<sup>332</sup> Amendments, however, are not granted as a matter of course, but are allowed with great caution.<sup>333</sup> As long as the proposed amendment to a return does not prejudice the rights of third persons acquired bona fide and without notice, and is clearly in conformity with the facts, it will generally be permitted.<sup>334</sup>

<sup>329</sup> *Metcalf v. Gillet*, 5 Conn. 400; *Howard v. Turner*, 6 Greenl. 106; *Banister v. Higginson*, 15 Me. 73, 32 Am. Dec. 134; *Munroe v. Reding*, 15 Me. 153; *Lumbert v. Hill*, 41 Me. 475; *Jackson v. Woodman*, 29 Me. 266; *Ladd v. Blunt*, 4 Mass. 402; *Wellington v. Gale*, 13 Mass. 483; *Williams v. Amory*, 14 Mass. 20.

<sup>330</sup> *Welsh v. Joy*, 13 Pick. 477.

<sup>331</sup> *Kellogg v. Wadhams*, 9 Conn. 208.

<sup>332</sup> *Chase v. Williams*, 71 Me. 190.

<sup>333</sup> *Chase v. Williams*, 71 Me. 190; *Hobart v. Bennett*, 77 Me. 401.

<sup>334</sup> *Pratt v. Wheeler*, 6 Gray, 520; *Brown v. Washington*, 110 Mass. 529; *Bates v. Willard*, 10 Met. 62; *Mahurin v. Brackett*, 5 N. H. 9; *Eveleth v. Little*, 16 Me. 374; *Glidden v. Philbrick*, 56 Me. 222.

Where the truth of a return is not questioned and no good reason to the contrary is shown, the officer should be allowed to amend by signing it.<sup>335</sup> While in one instance an application for permission to amend a return was denied, because not made until after the lapse of twenty-six years,<sup>336</sup> still it cannot be said that there is any limitation of time after which such an application must be denied. Thus, leave to make an amendment was granted twenty years after the return had been recorded;<sup>337</sup> and the general practice is to permit the amendment of the return at the trial of actions in which title is sought to be deraigned under the extent, irrespective of the time which has elapsed,<sup>338</sup> unless the officer making the return has become interested in making the amendment,<sup>339</sup> or an innocent party will be prejudiced if the permission to amend is granted.<sup>340</sup> But if the return contains sufficient matter to indicate that in making the extent, all the requirements of the statute have probably been complied with, an amendment may be made notwithstanding any intervening interest of a subsequent purchaser or creditor.<sup>341</sup> As a general rule, amendments are never permitted to inflict a wrong upon strangers to a suit. Where the record of the extent does not show that it was valid, strangers are authorized to treat with the defendant as still being the owner of the property sought to be taken from him. When they have so treated with him and have,

<sup>335</sup> *Briggs v. Hodgdon*, 78 Me. 514.

<sup>336</sup> *Russ v. Gilman*, 16 Me. 209.

<sup>337</sup> *Gilman v. Stetson*, 16 Me. 124.

<sup>338</sup> *Howard v. Turner*, 6 Greenl. 106.

<sup>339</sup> *Pierce v. Strickland*, 26 Me. 277.

<sup>340</sup> *Briggs v. Hodgdon*, 78 Me. 514; *Wilson v. Bucknam*, 71 Me. 545.

<sup>341</sup> *Chase v. Williams*, 71 Me. 190; *Glidden v. Philbrick*, 56 Me. 222; *Saunders v. First Nat. Bank*, 61 N. H. 81.

in good faith, and for a valuable consideration, become vested with his title, their equity is equal to that of the creditor. The court will not, where the equities are equal, interpose to assist the creditor by ordering an amendment of the return, and by making that appear valid which before appeared invalid.<sup>342</sup> Where an officer's return affirms the giving of the statutory notice he will not be allowed to amend so as to show that such notice was not given.<sup>343</sup> But where the party holding title under the defendant had notice of the facts authorizing the proposed amendment, he cannot successfully resist the application to amend.<sup>344</sup> A subsequent attaching creditor may successfully resist an application to amend if he did not have notice of such facts at the time of making his attachment although he did have such notice at the time of making his levy.<sup>345</sup> The record, while not so perfect as to be in no need of amendment, may yet, taken as a whole, show that all essential acts were performed, or at least may make it appear probable that they were not omitted. In such a case it operates as constructive notice to all persons, and authorizes an amendment as against all persons,<sup>346</sup> and the amendment, when ordered and made, makes

<sup>342</sup> *Berry v. Spear*, 13 Me. 187; *Banister v. Higginson*, 15 Me. 73, 32 Am. Dec. 134; *Means v. Osgood*, 7 Greenl. 146; *Bowman v. Stark*, 6 N. H. 459; *Fairfield v. Paine*, 23 Me. 498, 41 Am. Dec. 357; *Lumbert v. Hill*, 41 Me. 475; *Boynton v. Grant*, 52 Me. 220; *Williams v. Brackett*, 8 Mass. 240; *Emerson v. Upton*, 9 Pick. 167; *Hovey v. Walt*, 17 Pick. 196; *Barnard v. Stevens*, 2 Aiken, 429, 16 Am. Dec. 733.

<sup>343</sup> *Hobart v. Bennett*, 77 Me. 401.

<sup>344</sup> *Haven v. Snow*, 14 Pick. 28.

<sup>345</sup> *Williamson v. Wright*, 75 Me. 35.

<sup>346</sup> *Fairfield v. Paine*, 23 Me. 498, 41 Am. Dec. 357; *Baker v. Davis*, 19 N. H. 325; *Whittier v. Barney*, 10 N. H. 291; *Rollins v. Rich*, 27 Me. 557; *Whittier v. Vaughan*, 27 Me. 301; *Glidden v. Philbrick*, 56 Me. 222; *Derry Bank v. Webster*, 44 N. H. 264; *Gibson v. Bailey*,

the writ as binding as if no amendment had ever been needed.<sup>347</sup> Insufficiency or uncertainty of description may be remedied by amendment.<sup>348</sup> A return of a levy upon an equity to redeem from a mortgage may be amended to show that such equity included a creditor's right to contest the validity of a second mortgage.<sup>349</sup> A mistake in a date may be corrected by amendment, as where an officer states that he gave notice to the defendant to choose an appraiser in October, 1876, when he intended October, 1879.<sup>350</sup>

**§ 389. Redemption of Lands Which have been Extended.**—In Maine, real estate may be redeemed within one year after the levy thereon, by paying or tendering to the creditor the amount of its appraisement, with interest from the levy, with reasonable expenses of improvements, repairs, or taxes, after deducting the rents and profits. After such redemption, the creditor must execute a deed of release to the debtor.<sup>351</sup> The statute also provides methods by which the amount required to redeem may be ascertained;<sup>352</sup> and in case the creditor, upon sufficient tender being made, refuses to release, the debtor may recover the lands by writ of entry, upon bringing into court the money tendered.<sup>353</sup> Redemption may be made by payment to the creditor's attorney who recovered the judgment.<sup>354</sup> Though sev-

<sup>347</sup> 9 N. H. 168; *Avery v. Bowman*, 39 N. H. 393; *Smith v. Knight*, 20 N. H. 9; *Peaks v. Gifford*, 78 Me. 362.

<sup>348</sup> *Symonds v. Harris*, 51 Me. 14, 81 Am. Dec. 553.

<sup>349</sup> *Saunders v. First Nat. Bank*, 61 N. H. 31.

<sup>350</sup> *Mathes v. Dover Nat. Bank*, 62 N. H. 491.

<sup>351</sup> *Peaks v. Gifford*, 78 Me. 362.

<sup>352</sup> Rev. Stats. Me., 1883, p. 617, § 25.

<sup>353</sup> *Ibid.*, §§ 26, 28.

<sup>354</sup> *Ibid.*, p. 618, § 27.

<sup>355</sup> *Gray v. Wass*, 1 Greenl. 257.

eral parcels have been extended, and separate appraisements thereof have been made, no redemption can be made without paying the entire amount of the extent.<sup>355</sup> When the debtor, after making a sufficient tender, brings a writ of entry, he may bring the money tendered into court at any time before judgment.<sup>356</sup> A debtor paying part of the sum needed to make a redemption, and failing as to the residue, loses both his land and his money.<sup>357</sup> Where a bill in equity is brought to redeem, it must be filed so early that the amount can be ascertained and brought into court before the expiration of one year from the levy.<sup>358</sup> "A reception by a mortgagee of his debt after a foreclosure of his mortgage operates as a waiver of the forfeiture, and an extinguishment of his title."<sup>359</sup> No good reason is perceived why the reception of his debt, after the time allowed by law for the redemption of a levy, should not have like effect upon the title of judgment creditor acquired by the levy."<sup>360</sup> A court of equity may for good cause extend the time for redeeming land from execution.<sup>361</sup> Or the creditor may by parol extend such time for redemption.<sup>362</sup> If the creditor insures buildings on the premises in his own name, and with his own funds, the amount which he may realize through their loss from such insurance cannot in Maine be deducted

<sup>355</sup> *Foss v. Stickney*, 5 Me. 390; *Bond v. Bond*, 2 Pick. 382; *Cross v. Weare*, 62 N. H. 125.

<sup>356</sup> *Ibid.*

<sup>357</sup> *Morton v. Chandler*, 6 Me. 142.

<sup>358</sup> *Boothby v. Commercial Bank*, 30 Me. 361.

<sup>359</sup> *Cutts v. York Mfg. Co.*, 18 Me. 190; *Converse v. Cook*, 8 Vt. 164; *Batchelder v. Robinson*, 6 N. H. 12.

<sup>360</sup> *Randall v. Farnham*, 36 Me. 88.

<sup>361</sup> *Carroll v. McCullough*, 63 N. H. 95.

<sup>362</sup> *Mayo v. Hamlin*, 73 Me. 182.

from the amount which the debtor must pay to effect a redemption.<sup>363</sup> The statute of New Hampshire provides that every extent shall be void, if, within one year from the return day of the writ, the debtor or any person interested pays or tenders the amount at which the real estate was set off, with interest, taxes, and reasonable expenses of repairs, improvements, and insurance, deducting rents and profits;<sup>364</sup> or the debtor may make full payment, and thereafter sue and recover rents and profits from the creditor.<sup>365</sup> When the redemption has been consummated, the creditor must execute a release.<sup>366</sup> The statute of Massachusetts, fixing the time when redemption may be made, the amount to be paid, the methods of ascertaining such amount, the execution of the release by the creditor, and the remedies available to the debtor, is very similar in its terms to the statute of Maine, to which reference has already been made.<sup>367</sup> By the statute of Vermont, the person whose estate has been extended, or his legal representatives, may, within six months from the time the execution was extended, "tender and pay to the clerk of the court or justice to whom such execution was returned the sum at which such real estate was appraised and set off on such execution, together with the

<sup>363</sup> Cushing v. Thompson, 34 Me. 496.

<sup>364</sup> Gen. Laws, N. H., 1878, p. 549, § 13.

<sup>365</sup> Ibid, p. 549, § 20.

<sup>366</sup> Ibid, § 21.

<sup>367</sup> Pub. Stats. Mass., 1882, pp. 1012, 1013, §§ 31-40. As to time for redemption, see Bigelow v. Wilson, 1 Pick. 485; Fuller v. Russell, 6 Gray, 128; Norton v. Babcock, 2 Met. 518; what will be allowed for repairs and improvements, Norton v. Babcock, 2 Met. 518; who may redeem, Bigelow v. Wilson 1 Pick. 485; writ of entry by debtor against creditor, Hooker v. Hudson, 19 Pick. 467; bills to redeem and decrees thereon, Houghton v. Field, 2 Cush. 141; Elliott v. Balcolm, 11 Gray, 286; Richardson v. Washington Bank, 3 Met. 536.



legal interest thereon; and such clerk or justice shall receive the same, and deliver a certificate thereof to the person making such payment.”<sup>368</sup> This certificate, upon being recorded in the town or county clerk’s office where the writ was recorded, defeats the title derived under the extent.<sup>369</sup> Under this statute the tender must be made to the clerk or justice. If made to the creditor, it is good for naught.<sup>370</sup> If the estate extended is not redeemed in the time and manner designated by the statute, the creditor may enter and take possession.<sup>371</sup>

§ 390. To What Date does the Extent Relate?—When the extent is completed, it is desirable to know at what time the title of the defendant may be regarded as divested, with respect to subsequent conveyances and encumbrances. No doubt the proceedings, when consummated, relate back so as to take effect at the time when the extent was commenced.<sup>372</sup> In a late Connecticut case, however, it is said: “It is true that under a levy duly perfected the title of the creditor commonly relates back to the first step in the process; but this legal fiction is never permitted to work injustice to a bona fide purchaser, in whom any rights may meanwhile become vested.”<sup>373</sup> But at what time does an extent commence? In Maine, it was once held that an extent could not be considered as commenced until the appraisers were sworn;<sup>374</sup> and it was doubted whether it could be regarded as begun before the lands were

<sup>368</sup> Rev. Laws Vt., 1880, § 1575.

<sup>369</sup> Ibid.

<sup>370</sup> *Chandler v. Sawtell*, 22 Vt. 318.

<sup>371</sup> Rev. Laws Vt., 1880, § 1578.

<sup>372</sup> *Clement v. Garland*, 53 Me. 427.

<sup>373</sup> *Schroeder v. Tomlinson*, 70 Conn. 348.

<sup>374</sup> *Allen v. Portland Stage Co.*, 8 Greenl. 207. This is the rule in New Hampshire. *Colburn v. Pomeroy*, 44 N. H. 19.

shown to them to be appraised. This decision has been disapproved elsewhere. In Massachusetts, it is clear that the extent begins at least as early as the moment when the debtor is notified to select an appraiser; and it is probable that it begins as soon as, by an indorsement on his writ, or by any other means, the officer has indicated his intention of extending any particular parcel of real estate.<sup>375</sup> If an attachment and a subsequent levy under the execution, issued in the same case, "are both valid, then the creditor's title will relate back to the attachment, and take date from that time. If the levy is valid and the attachment void, then the creditor's title will take date from the time of the levy; and the fact that the officer refers to the attachment in his return upon the execution will not affect the validity of the levy."<sup>376</sup>

§ 391. The Ultimate Effect of the Extent, if no redemption is made, is to invest the creditor with all the title and right in the real estate taken to which the debtor was entitled at the time of the levy.<sup>377</sup> The judgment debt, to the extent of the value of the real estate set off, is regarded as satisfied and paid.<sup>378</sup> If the lands do not belong to the debtor, the creditor can acquire no title and no seisin<sup>379</sup> by virtue of his extent, nor can he thereby acquire any interest in such title as may subsequently become vested in the defendant.<sup>380</sup> But as soon as seisin is delivered by the officer to the creditor, he becomes, until redemption is made, invested with all the defendant's title in the property.

<sup>375</sup> *Hall v. Crocker*, 3 Met. 245. See *French v. Allen*, 50 Me. 437.

<sup>376</sup> *Brackett v. Ridlon*, 54 Me. 433.

<sup>377</sup> *Murray v. Emmons*, 19 N. H. 483.

<sup>378</sup> *Moore v. McMillan*, 54 Vt. 17.

<sup>379</sup> *Bott v. Burnell*, 9 Mass. 96.

<sup>380</sup> *Freeman v. Thayer*, 33 Me. 76.

The title and right of possession thereby acquired are sufficient to entitle the judgment creditor to enter upon the land.<sup>381</sup> If the defendant continues in possession, he must be regarded as a mere tenant at sufferance.<sup>382</sup> The creditor may, by virtue of his own seisin, maintain a real action, or recover in trespass against the debtor for continuing in possession.<sup>383</sup>

<sup>381</sup> *Bergeron v. Dartmouth Sav. Bank*, 62 N. H. 655.

<sup>382</sup> *Bryant v. Tucker*, 19 Me. 383; *Nason v. Grant*, 21 Me. 160; *Nickerson v. Whittier*, 20 Me. 223.

<sup>383</sup> *Langdon v. Potter*, 8 Mass. 215; *Gore v. Brazier*, 8 Mass. 523, 8 Am. Dec. 182.

## CHAPTER XXIX.

PROCEEDINGS AT LAW SUPPLEMENTAL TO OR IN  
AID OF EXECUTION.

- § 392. Definition of supplemental proceedings, and of other terms used in this chapter.
- § 393. The object of supplemental proceedings.
- § 394. Whether supplementary proceedings supersede creditor's suits.
- § 395. The nature, classification, and effect of supplemental proceedings.
- § 396. On what judgments and in what time may be prosecuted.
- § 397. Courts and judges having jurisdiction.
- § 398. Who may prosecute.
- § 398a. Against whom may be prosecuted.
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## PROCEEDINGS AGAINST THE DEFENDANT.

- § 399. Facts necessary to authorize.
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## PROCEEDINGS AGAINST THIRD PERSONS.

- § 407. This proceeding is independent of the others.
- § 408. Order of examination, how procured, and facts necessary to support.
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- § 412. The effect of the notice.
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- § 420. The property that may be reached.
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- § 422. Costs.
- § 423. Of the right of the debtor of defendant to pay the officer holding the writ.
- § 423a. The effect of orders as res judicata.

• **§ 392. Definition of Supplemental Proceedings, and of Other Terms Used in This Chapter.**—The ordinary method of enforcing a judgment for money is by levy and sale of the property of the defendant.<sup>1</sup> This method frequently proves inadequate, and, hence, various other methods have been resorted to for the purpose of obtaining satisfaction. One of the most familiar of these is by a proceeding in chancery, commonly known as a creditor's suit. The object of this suit was either to obtain a discovery of assets subject to execution at law, or to secure the interposition of courts of equity to set aside fraudulent transfers and assignments, or else to obtain satisfaction out of assets which were not within reach of an ordinary writ of execution. Under the statutes now in force in the United States, the necessity for creditors' suits is very materially diminished. By virtue of garnishments, of trustee process, or of proceedings supplemental to exe-

<sup>1</sup> The defendant and the defendant's debtor cannot be joined as codefendants. They are under no joint obligation to the plaintiff. Hence the necessity of some proceeding, such as garnishment or trustee process, by which the plaintiff can obtain the benefit of choses in action belonging to the defendant. *Lee v. F. L. Ins. Co.*, 1 Handy, 217; *Hays v. N. B. & N. H. T. & B. Co.*, 1 Handy, 281.

cution, several of the objects formerly accomplished by creditors' bills are now more speedily and easily obtained by proceedings at law. In some of the states, the statutes providing for garnishment under writs of attachment are made applicable to proceedings under execution.<sup>2</sup> In other states, statutory provisions have been enacted, which apply exclusively to writs of execution, and the proceedings had thereunder are usually called "supplemental" or "supplementary proceedings," or "proceedings supplemental to execution." In the course of this chapter we shall usually employ the term "garnishee" to indicate the person summoned to appear, whether the proceedings against him are under statutes concerning trustee process, or in relation to garnishment, or under those providing for supplemental proceedings. And we shall generally apply the term "garnishment" to indicate any proceeding taken under execution against the defendant's debtor, whether this proceeding is by trustee process, or under a statutory provision authorizing a garnishment, or under one purporting to provide for proceedings supplemental to execution. The use to which we propose to devote these terms may be such as to provoke just criticism, but we trust that it will not in any case prevent us from being clearly understood.

**§ 393. The Object of Supplemental Proceedings.—**By proceedings supplemental to execution, the plaintiff usually seeks to accomplish one of four different objects: 1. The plaintiff may compel the judgment debtor to appear and answer concerning his property, and may thus be enabled to ascertain from the defend-

<sup>2</sup> Sayles' Tex. Civ. Stats., § 217.

ant whether he has any assets subject to execution.<sup>3</sup> 2. The plaintiff may, upon proof that the defendant has property which he unjustly refuses to apply to the satisfaction of the judgment, obtain an order for the arrest or examination of the debtor, and also for the delivery by the debtor of such property in his hands as may be liable to the writ.<sup>4</sup> 3. The plaintiff may obtain an order that any person or corporation having property of the judgment debtor, or indebted to him, shall appear and answer concerning the same; and may either obtain an order requiring the delivery, by the corporation or persons so summoned, of property in their possession, or may be authorized to commence proceedings to obtain possession of the property, or to recover a debt due to the defendant from the persons or corporations summoned.<sup>5</sup> 4. The plaintiff may, in some instances, under proceedings supplemental to

<sup>3</sup> Cal. Code Civ. Proc., § 714; N. Y. Code Civ. Proc., 1895, § 2436; Ohio Rev. Stats., 7th ed., § 5472; Iowa Code, 1897, § 4072; S. C. Code Civ. Proc., § 312; Rev. Stats. Nev., § 3262; Stats. Wis., § 3030; Ind. Code Civ. Proc., 1894, § 827; Kan. Code Civ. Proc., 1897, § 502.

<sup>4</sup> N. Y. Code, § 2447; Cal. Code Civ. Proc., § 715; Ohio Rev. Stats., 7th ed., § 5473; Iowa Code, §§ 4073, 4085; Gen. Stats. Nev., § 3263; S. C. Code Civ. Proc., § 312; Stats. Wis., § 3030; Ind. Code Civ. Proc., § 828; Kan. Code Civ. Proc., § 503.

<sup>5</sup> Cal. Code Civ. Proc., § 717; Ohio Rev. Stats., § 5475; S. C. Code Civ. Proc., § 314; Gen. Stats. Nev., § 3265; Stats. Wis., § 3029; Ind. Code Civ. Proc., § 831; Kan. Code Civ. Proc., § 508. The statutory classification made by statute in New York is as follows: "This title provides for three distinct remedies, as follows: 1. An order made or a warrant issued against a judgment debtor after the return of an execution; 2. An order made or a warrant issued against a judgment debtor after the issuing and before the return of an execution; 3. An order made after the issuing and either before or after the return of an execution, against a person who has property of the judgment debtor or is indebted to him. The proceedings under subdivision third of this section may be pursued either alone or simultaneously with the proceedings under either subdivision first or subdivision second." N. Y. Code Civ. Proc., § 2432.

execution, reach assets which, though known to him, and not in the possession of a third person, are nevertheless beyond the reach of an ordinary execution." "An examination of the several provisions of the Code of Civil Procedure relating to supplementary proceedings shows that its purpose is to furnish a simple and ready substitute for all equity proceedings in discovering and applying the property of the debtor, which cannot otherwise be reached, to the payment of his debts."<sup>7</sup> "A proceeding supplementary to execution is but the prolongation of the original action, and as full redress both in law and in equity may now be obtained by a resort to this statutory remedy, it is but a substitute for the former creditors' bill, and partakes of its essential nature, and is a new and independent, though subsidiary suit."<sup>8</sup> To make the proceeding more effective by preventing any change in the condition of the defendant's affairs, after its institution, an order may be procured in the nature of an injunction forbidding him and any person owing him or having possession of his property from making any payments or transfers thereof until the further order of the court.<sup>9</sup>

**§ 394. Whether Statutes Authorizing Supplemental Proceedings Abolish Creditors' Suits.**—It has very frequently been stated that proceedings supplemental to

\* In Indiana choses in action can be subjected to execution only by supplemental proceedings. *Keightley v. Walls*, 27 Ind. 384; Ohio Rev. Stats., § 5464; Iowa Code, §§ 4087-4090, 4099; Kan. Code Civ. Proc., § 501.

<sup>7</sup> *Joyce v. Shafard*, 9 N. Y. Civ. Proc. Rep. 345.

<sup>8</sup> *Munds v. Cassidy*, 98 N. C. 558.

<sup>9</sup> *Batterman v. Finn*, 32 How. Pr. 501; *Coates v. Wilkes*, 94 N. C. 174; *Farmers' etc. N. B. v. Burns*, 109 N. C. 105; *In re Perry*, 30 Wis. 268.



execution are a substitute for creditors' suits.<sup>10</sup> From this general declaration contained in many of the decisions, it has sometimes been inferred that creditors' suits cannot be sustained under any circumstances in a state where the remedy by supplemental proceedings has been given by statute.<sup>11</sup> But it must be remembered that while proceedings supplemental to execution accomplish several of the purposes formerly realized by creditors' suits, yet that they cannot accomplish all those purposes. Where the statutes have provided adequate remedies at law, those remedies may perhaps be construed as furnishing a sufficient reason, in the cases to which they apply, for refusing to give relief by proceedings in equity. Hence, it is probable that a creditor's bill for the discovery of assets cannot now be sustained in many of the states, for it is obvious that all which could be accomplished by such a suit can be more easily and quickly obtained by an examination of the debtor, or of third persons, in proceedings supplemental to execution.<sup>12</sup> That the remedy by supplemental proceedings is exclusive may be maintained with special force in states whose proceedings are regulated by a code, and the provisions

<sup>10</sup> *Sale v. Lawson*, 4 Sand. 718; *Driggs v. Williams*, 15 Abb. Pr. 477; *Dunham v. Nicholson*, 2 Sand. 636; *Quick v. Keeler*, 2 Sand. 231, *People v. Mead*, 29 How. Pr. 360; *Re Remington*, 7 Wis. 643; *Adams v. Hackett*, 7 Cal. 187; *McCullough v. Clark*, 41 Cal. 298; *Smith v. Weeks*, 60 Wis. 94.

<sup>11</sup> *Graham v. L. O. & M. R. R. Co.*, 10 Wis. 459; *Seymour v. Briggs*, 11 Wis. 196. But creditors' bills have been restored to the procedure of this state. *Williams v. Sexton*, 19 Wis. 42; *Winslow v. Dousman*, 18 Wis. 456. In Indiana, proceedings supplemental to execution will "be confined to cases clearly within the provisions of the statute." *Burt v. Hoettinger*, 28 Ind. 217.

<sup>12</sup> *Taylor v. Persse*, 15 How. Pr. 417; *Fligg v. Snook*, 9 Ind. 202, *Catlin v. Doughty*, 12 How. Pr. 457; *Mason v. Weston*, 29 Ind. 561.

of the code are adequate to the accomplishment of the end sought by a creditor's bill. A code of procedure is usually understood as prescribing remedies which are exclusive in their nature, and which, when applicable to the relief sought, exclude or supplant all other modes of redress. Whether these principles apply to supplemental proceedings has not been considered in a majority of the states in which they are authorized; but the result of such consideration as has been given supports the view that they supplant proceedings in equity, unless some special ground exists upon which to invoke the power of chancery.<sup>13</sup> Hence, after considering the code of that state and the various decisions thereunder, the supreme court of California concluded that "it is not necessary, however, to go to the length of saying that a creditors' bill could not be sustained here under any circumstances; for there might, perhaps, be cases in which the statutory proceedings would not afford an adequate remedy; but they must be pursued, unless in those exceptional cases in which it appears that equity must be invoked, because the legal remedies are unavailing."<sup>14</sup> But two of the chief objects of creditors' bills were to reach equitable assets and to set aside fraudulent transfers of property. For the pursuit of these objects, supplemental proceedings do not afford an adequate remedy, and hence both, as formerly, may still be pursued by creditors' suits.<sup>15</sup>

<sup>13</sup> *Rand v. Rand*, 78 N. C. 12; *Hexter v. Clifford*, 5 Colo. 168; *High v. Bank of Commerce*, 95 Cal. 386, 29 Am. St. Rep. 121; *Mason v. Weston*, 29 Ind. 561; *Sperling v. Calfee*, 7 Mont. 514; *Smith v. Weeks*, 60 Wis. 94.

<sup>14</sup> *Herrlich v. Kaufmann*, 99 Cal. 271, 37 Am. St. Rep. 50.

<sup>15</sup> *Pope v. Cole*, 64 Barb. 406; *Taylor v. Persse*, 15 How. Pr. 417; *Goodyear v. Betts*, 7 How. Pr. 187; *Rogers v. Hern*, 2 Code R. 79;

The judicial declaration so frequently made, that supplemental proceedings are substitutes for creditors' bills, has something beyond a mere descriptive significance. In other words, its effect is not limited to the mere designation of the purpose and result of supplemental proceedings, but naturally extends to the adoption, in the conduct and determination of these proceedings, of the rules of equity applicable to creditors' bills.<sup>16</sup> Hence, as a creditor's bill would be dismissed for want of equity, if it failed to disclose any reason for not resorting to the tribunals of the law, so it is said that supplemental proceedings will not be tolerated unless it appears that the plaintiff could not successfully proceed by the ordinary methods of levy and sale under execution.<sup>17</sup> A creditor's bill might reach equitable assets and other property not subject to execution at law. Supplemental proceedings, being a substitute for creditors' bills, must be held to embrace within their scope the same classes of property.<sup>18</sup> And as various ancillary remedies, such as injunctions, the appointment of receivers, and the like, will, if necessary, be granted in aid of a creditor's suit, so, also, will they be allowed to make effectual supplemental

*Hammond v. H. R. I. & M. Co.*, 20 Barb. 378; 11 How. Pr. 29; *Bartlett v. Drew*, 4 Lans. 444; 60 Barb. 648; *Parshall v. Tillou*, 13 How. Pr. 7; *Bennett v. McGuire*, 58 Barb. 625; *Gere v. Dibble*, 17 How. Pr. 31; *Phelps v. Platt*, 50 Barb. 430; *Taft v. Wright*, 47 How. Pr. 1; *Davis v. Turner*, 4 How. Pr. 190; *McKeithan v. Walker*, 66 N. C. 95; *Burt v. Hoettlinger*, 28 Ind. 217; *Parsons v. Meyburg*, 1 Duvall, 206; *Ludes v. Hood*, 29 Kan. 49; *Monroe v. Reid*, 46 Neb. 316; *Klosterman v. Mason Co. C. R. Co.*, 8 Wash. 281.

<sup>16</sup> *Smith v. Mahony*, 3 Daly, 285.

<sup>17</sup> *Cushman v. Gephart*, 97 Ind. 46; *Dillman v. Dillman*, 90 Ind. 585; *Balz v. Bennighoff*, 5 Ind. App. 522.

<sup>18</sup> *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *Smith v. Weeks*, 60 Wis. 94.

proceedings.<sup>19</sup> So proceedings supplemental to execution may, like a creditor's suit, entitle the plaintiff to the preference conceded to a vigilant creditor, and vest in him a lien upon equitable assets.<sup>20</sup>

§ 395. **The Nature, Classification, and Effect of Supplemental Proceedings.**—The objects of supplemental proceedings are of a very unmistakable character; but in some of the states, the nature or classification of such proceedings has developed considerable judicial dissension. Thus, in New York, they have sometimes been regarded as special proceedings;<sup>21</sup> sometimes, as in their nature and character, a new suit;<sup>22</sup> and more frequently and justly they have been treated as proceedings in the original action taken for the purpose of rendering effectual the judgment therein.<sup>23</sup> The courts of Indiana, nevertheless, insist that, though proceedings supplementary to execution are in aid of the judgment in the original action, they are not part of such action, but constitute a new and independent suit.<sup>24</sup>

<sup>19</sup> *Coates v. Wilkes*, 92 N. C. 376.

<sup>20</sup> *Lynch v. Johnson*, 48 N. Y. 27.

<sup>21</sup> *Davis v. Turner*, 4 How. Pr. 190; *Campbell v. Foster*, 16 How. Pr. 275; N. Y. C. C. P., § 2433; *Graves v. Scoville*, 12 N. Y. Civ. Proc. R. 165. They are now classified as special proceedings by the code of New York. *Fiske v. Twigg*, 50 N. Y. Sup. Ct. 69.

<sup>22</sup> *Griffin v. Dominguez*, 2 Duer, 656; *Driggs v. Williams*, 15 Abb. Pr. 477; *Underwood v. Sutcliffe*, 10 Hun, 453.

<sup>23</sup> *Matter of Crane*, 81 Hun, 96, 30 N. Y. Supp. 616; *Dresser v. Van Pelt*, 15 How. Pr. 19; *President v. Spencer*, 15 How. Pr. 412; *Gould v. Torrance*, 19 How. Pr. 560; *Mallory v. Gulick*, 15 Abb. Pr. 307, note; *Ross v. Clussman*, 3 Sand. 676; *Seeley v. Black*, 35 How. Pr. 369; *Wegman v. Childs*, 41 N. Y. 159; *Wright v. Nostrand*, 94 N. Y. 45; *Collins v. Angell*, 72 Cal. 513; *McCaskill v. Lancashire*, 83 N. C. 393; *Kennesaw Mills Co. v. Walker*, 19 S. C. 104; *Estey v. Fuller I. Co.*, 82 Ia. 678; *Barker v. Dayton*, 28 Wis. 367.

<sup>24</sup> *Harper v. Behagg*, 14 Ind. App. 427; *Pounds v. Chatham*, 96 Ind. 342; *Chicago etc. R. W. Co. v. Summers*, 113 Ind. 10, 3 Am. St. Rep. 616.

They are proceedings at law,<sup>25</sup> and not suits in equity. Hence, they cannot be employed to accomplish the foreclosure of a chattel or other mortgage held by the judgment debtor on the property of a garnishee.<sup>26</sup> In New York, before the adoption of the present code, the court of appeals, speaking of a supplemental proceeding, said: "This proceeding cannot, therefore, be termed a special statutory proceeding before a court or officer of limited jurisdiction in the sense that the facts conferring jurisdiction of the matter must be affirmatively proved whenever questioned in a collateral proceeding; but it is simply a new remedy in an action in which the court is possessed of general jurisdiction, and where the acts of the officers are entitled to all the presumptions of regularity which belong to the proceedings of courts of general jurisdiction. It seems to us, therefore, that the orders of a court or judge authorized by law to act in such a proceeding must be presumed to be regular until annulled in a direct proceeding to review or set them aside; and that such orders, so far as they recite the facts necessary to confer jurisdiction upon a court or judge to move in the proceedings, furnish prima facie evidence of the existence of such facts."<sup>27</sup>

Proceedings supplementary to execution do not terminate or suspend other remedies at law which the plaintiff is entitled to pursue under his judgment. He may, therefore, notwithstanding these proceedings and the appointment of a receiver therein, issue execution in the action and cause it to be levied upon any prop-

<sup>25</sup> *Estey v. Fuller L. Co.*, 82 Ia. 678; *Williams v. Gallick*, 11 Or. 337.

<sup>26</sup> *Knowles v. Herbert*, 11 Or. 240.

<sup>27</sup> *Wright v. Nostrand*, 94 N. Y. 45.

erty, the title or possession of which is not vested in the receiver.<sup>28</sup> So, if for the purpose of preserving some right or remedy, it is necessary for him to issue execution at any particular time, the pendency of supplemental proceedings does not exonerate him from procuring such issuing.<sup>29</sup> These proceedings are terminated by an assignment for the benefit of creditors made before any lien has attached to any property, or by any other act which necessarily renders it impossible for the supplemental proceedings to secure any advantage to the judgment creditor.<sup>30</sup>

The decision or order made by the court or judge, in proceedings supplemental to execution, is conclusive upon the parties. If the person summoned is discharged, his liability cannot be again drawn in question, unless it is shown he has, since his former examination, acquired property subject to the writ.<sup>31</sup>

**§ 396. On What Judgments and within What Time may be Prosecuted.**—As a general rule, these proceedings may be prosecuted on any valid personal judgment or decree for the payment of a specific sum of money,<sup>32</sup> upon which a right to execution against the

<sup>28</sup> *Smith v. Davis*, 63 Hun, 100.

<sup>29</sup> *Newgas v. Solomon*, 20 Abb. N. C. 175.

<sup>30</sup> *Holton v. Burton*, 78 Wis. 321.

<sup>31</sup> *Carter v. Clarke*, 7 Robt. 43; *Orr's Case*, 2 Abb. Pr. 457.

<sup>32</sup> *Barker v. Dayton*, 28 Wis. 367; *Bailey v. Dubuque W. R. R.*, 13 Iowa, 97; *Sage v. St. Paul etc. R. Co.*, 47 Fed. Rep. 3. If an order is entered requiring the purchaser at a judicial sale to pay the damages or deficiency resulting from a resale, on which an execution may issue, it may be enforced by supplemental proceedings. *Lydecker v. Smith*, 44 Hun, 454. Perhaps it may be necessary for the judgment to be actually entered as well as rendered. In Montana, it was held that the entry of a judgment *nunc pro tunc* could not support supplemental proceedings previously instituted. *Barber v. Briscoe*, 9 Mont. 341.

judgment debtor exists.<sup>33</sup> The code of New York limits the judgments upon which supplemental proceedings may be based to those which "have been rendered upon the judgment debtor's appearance, or by a personal service of the summons upon him." It was hence claimed in that state that a judgment entered upon a recognizance after a forfeiture, there being no action and no appearance by the judgment debtor, fell within this limitation, but the court, holding otherwise, said: "The purpose and scope of that limitation is quite plain. There are cases in which a formal judgment is rendered in which, nevertheless, the apparent debtor is not generally and personally liable, for lack of appearance or service of summons, as actions begun by attachment or against joint debtors where some only have been served, in which the liability is confined to some specific property and does not end in a general execution. Manifestly, in such case the defendant, affected only by the lien on the specific property charged, and not personally liable beyond that, should not be subjected to the supplementary proceedings. But the limitation was not intended to protect a judgment debtor who is liable personally and generally, against whom a general execution issues, and all whose property is bound by it. There is no reason for a discrimination among debtors of that class and character."<sup>34</sup>

As a state has no jurisdiction over nonresidents, a personal judgment against a nonresident, unless based upon his appearance in the action, or on a personal service of process made on him in the state, is void,

<sup>33</sup> Siegel v. Schueck, 60 Ill. App. 429; Pierce v. Wade, 19 Ill. App. 185.

<sup>34</sup> People v. Cowan, 146 N. Y. 348.

and cannot be aided by proceedings supplemental to execution.<sup>35</sup> These proceedings are available where judgment has been rendered under the joint-debtor act, based upon service on one only of the defendants;<sup>36</sup> and also to enforce the collection of interest and costs, after the principal sum of the judgment has been paid,<sup>37</sup> or to enforce a judgment for costs only.<sup>38</sup> A valid judgment may be entered against an infant, a lunatic, or a married woman, and when entered may be enforced by execution; and proceedings supplemental to execution may be prosecuted on such judgment as well as upon a judgment against a person laboring under no disability.<sup>39</sup> If a judgment is against an administrator personally, it forms a proper and sufficient basis for supplemental proceedings.<sup>40</sup> Sometimes these proceedings are confined to judgments of not less than a specified amount.<sup>41</sup>

When the right to prosecute supplemental proceedings once becomes perfect, it continues during the life of the judgment, and is not barred by any lapse of time less than that which could bar the assertion of

<sup>35</sup> *Bartlett v. McNeill*, 60 N. Y. 53; *Bartlett v. Spicer*, 75 N. Y. 528.

<sup>36</sup> *Jones v. Lawlin*, 1 Sand. 722; *Emery v. Emery*, 9 How. Pr. 130.

<sup>37</sup> *Johnson v. Tuttle*, 17 Abb. Pr. 315.

<sup>38</sup> *Davis v. Herrig*, 65 How. Pr. 290; *Davis v. Jones*, 8 N. Y. Civ. Proc. R. 43; *Re Slrritt*, 54 N. Y. Supp. 666.

<sup>39</sup> *Lederer v. Ehrenfeld*, 49 How. Pr. 403; *Blake v. Respass*, 77 N. C. 193; *Thompson v. Sargent*, 15 Abb. Pr. 452; *Olinkscales v. Hall*, 15 S. C. 602.

<sup>40</sup> *Rhodes v. Casey*, 20 S. C. 491.

<sup>41</sup> Thus, in New York, supplemental proceedings cannot be sustained on a judgment of less than twenty-five dollars, exclusive of costs. *Butts v. Dickinson*, 20 How. Pr. 230; 12 Abb. Pr. 60; *Vulte v. Whitehead*, 2 Hilt. 596; *Anonymous*, 32 Barb. 201; *Whitlock's Case*, 1 Abb. Pr. 320; N. Y. Code Civ. Proc., § 2458; *Riddle and Bullard's Sup. Proc.* 52. Supplemental proceedings may be prosecuted on transcript from a justice's court, filed with the county clerk. *Conway v. Hitchins*, 9 Barb. 378.



the judgment.<sup>42</sup> In New York, where the proceeding is against the defendant to compel him to appear and be examined concerning his property, it must be instituted at any time within ten years after the return of an execution against property wholly or partly unsatisfied.<sup>43</sup> If an execution has been returned more than ten years, and the judgment is still in force, the judgment creditor may have an alias execution issued, and on its return, partly or wholly unsatisfied, may, at any time within ten years thereafter, institute proceedings against the defendant, if the judgment remains unsatisfied, and not barred by the statute of limitations.<sup>44</sup>

A general declaration in a statute that supplemental proceedings may be instituted at any time after the execution is returned satisfied must be construed in connection with other provisions of the statute tending to show when the judgment ceases to be operative. Thus, if there be a time prescribed after which no writ can issue, nor any action be sustained, upon the judgment, and after which it ceases to be a lien on real property, this indicates a legislative intention to destroy the judgment after the periods stated. Supplemental proceedings "are prosecuted for the same purpose for which an execution is employed, i. e., as a means of enforcing a valid, subsisting judgment. When it is ascertained that, for any reason, there is no longer any judgment, the proceeding to enforce it must fall to the ground. It is immaterial whether the judgment has been paid or has

<sup>42</sup> *Green v. Hauser*, 9 N. Y. Supp. 660; *Bolt v. Hauser*, 10 N. Y. Supp. 397, 57 Hun. 567; *Riddle and Bullard's Sup. Proc.* 77; *Owen v. Dupignac*, 9 Abb. Pr. 180; *Miller v. Rossman*, 15 How. Pr. 10; contra. *Currie v. Noyes*, 1 Code R., N. S., 198.

<sup>43</sup> N. Y. Code Civ. Proc., § 2435.

<sup>44</sup> *Levy v. Kirby*, 51 N. Y. Sup. Ct. 69.

ceased to possess life owing to the lapse of time. In such case, there is no longer any judgment left to support the steps taken to enforce it.”<sup>45</sup> The Code of Civil Procedure of New York declares that a creditor is entitled to institute these proceedings at any time within ten years after the return of an execution unsatisfied. A judgment is, in that state, barred after the lapse of twenty years. It ceases to be a lien upon real estate and chattels real fifteen years after its docketing. Supplemental proceedings were sought to be maintained on a judgment more than fifteen years, though within less than twenty years, after its rendition and docketing, and within ten years after an execution had been returned unsatisfied. The court held that the right to maintain such proceedings began at the first return of an execution unsatisfied, and must be prosecuted within ten years thereafter, and the right could not be renewed or extended by causing a further writ to be issued and returned unsatisfied, nor otherwise than by reviving his right by a suit upon the judgment prosecuted by permission of the court. The court further held that the right of the plaintiff was barred, because his judgment had ceased to operate as a lien upon the defendant’s real estate and chattels real, and could not, therefore, be effective to reach all the debtor’s property or to exhaust the legal remedy, and added: “When the various provisions of the code authorizing these proceedings are examined and considered as a general scheme to take the place of the former bill of chancery, the conclusion is reasonable that they are all based upon the assumption that at the time of issuing the execution, the creditor had a judgment which was

<sup>45</sup> *Merchants’ N. B. v. Braithwaite*, 7 N. D. 358, 66 Am. St. Rep. 953.

a lien on the debtor's real estate and chattels real, which would make the return effective to exhaust all remedies at law. They were not framed to meet a case like this, where, at best, the execution could reach only personal property. While the statute in terms permits the creditor to apply for the order within ten years from the return of an execution upon a judgment unsatisfied, yet it must mean, according to every fair analogy, an execution which is effective to exhaust the remedy at law, and, therefore, must refer to a judgment which is a lien upon real estate."<sup>46</sup>

§ 397. Courts and Judges having Jurisdiction.—The power to hear and determine proceedings supplemental to execution is sometimes confided to the court whence the execution issued, sometimes to the judge of such court, and sometimes to a county or probate judge. In fact, the statutes upon this subject are very dissimilar, and we can make no better suggestion than to refer each practitioner to the statutory provisions in force in his own state. As a general rule, however, these proceedings are carried on before a judge, and not before the court. In New York the court, as such, cannot cite the defendant, or any one else, to appear, nor can it make any order necessary to be made in the course of the proceedings.<sup>47</sup> In California, when the defendant is required to answer concerning his property, whether before or after the return of the writ, the order for his appearance must be made by a judge of the court.<sup>48</sup> When third persons are cited to appear, on the allegation that they are indebted to defendant, or have his

<sup>46</sup> *Importers' etc. Bank v. Quackenbush*, 143 N. Y. 567.

<sup>47</sup> *Miller v. Rossman*, 15 How. Pr. 10; *Biting v. Vandenburg*, 17 How. Pr. 80.

<sup>48</sup> Cal. Code Civ. Proc., § 714.

property in their possession, the order must be made by the judge of the court whence the execution issued.<sup>49</sup> In Ohio supplemental proceedings are conducted before the probate judge, or the judge of the court of common pleas of the county to which the execution was issued.<sup>50</sup> In New York there are quite a number of judges who may exercise jurisdiction of these proceedings;<sup>51</sup> but when any one of these judges has once assumed control, his jurisdiction is exclusive,<sup>52</sup> and no order whatever can be made except by him<sup>53</sup> or his successor in office.<sup>54</sup> If an order is made by a justice of the supreme court for the examination of a debtor in another judicial district, the order must be made returnable before a judge of that district.<sup>55</sup> In Indiana the proceedings

<sup>49</sup> Cal. Code Civ. Proc., § 717.

<sup>50</sup> Ohio Rev. Stats., 7th ed., § 5472.

<sup>51</sup> Thus, any justice of the supreme court may make an order for the examination of a defendant. *Bingham v. Disbrow*, 14 Abb. Pr. 251; 37 Barb. 24; *Wilson v. Andrews*, 9 How. Pr. 39. See *Riddle and Bullard's Sup. Proc.* 24-35; *Stright v. Vose*, 1 Code R., N. S., 79; *Crouse v. Wheeler*, 33 How. Pr. 337; *Blake v. Locy*, 6 How. Pr. 108; *Hayner v. James*, 17 N. Y. 316; *Griffin v. Griffith*, 6 How. Pr. 428; *Cushman v. Johnson*, 4 Abb. Pr. 256; 4 *Walt's Pr.*, p. 135.

<sup>52</sup> This assertion is not true with respect to proceedings in the first judicial district, or before the justices of the superior court of the city of Buffalo. See *Riddle and Bullard's Sup. Proc.* 13; *Dresser v. Van Pelt*, 15 How. Pr. 19.

<sup>53</sup> *Webber v. Hobbie*, 13 How. Pr. 382; *Bank of Genesee v. Spencer*, 15 How. Pr. 14; *Hulsaver v. Wiles*, 11 How. Pr. 446.

<sup>54</sup> *Holstein v. Rice*, 15 Abb. 307; 24 How. Pr. 135.

<sup>55</sup> *Browning v. Hayes*, 41 Hun, 382. Section 2434 of the Code of Civil Procedure of New York is as follows: "Either special proceedings may be instituted before a judge of the court, out of which, or the county judge, or the special county judge, or the special surrogate of the county to which the execution was issued; or, where it was issued to the city and county of New York, from a court other than the marine court of that city, before a judge of the common pleas for that city and county. Where the execution was issued out of a court other than the supreme court, and it is shown, by affidavit, that each of the judges, before whom the special pro-

must be initiated in any court of record in which the defendant or other person to be examined resides.<sup>56</sup> In Kentucky and North Carolina they must be instituted in the court where the judgment was rendered; but in the latter state, the place at which the defendant may be required to appear must be within the county in which he resides.<sup>57</sup>

A state court has no power to conduct proceedings for the enforcement of a judgment of one of the national courts.<sup>58</sup> Judgment creditors in the latter courts are, by section 916 of the Revised Statutes of the United States, entitled to similar remedies upon their judgments, "to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state" in which such judgments were entered, and also to such remedies as may be enacted by such state, and adopted thereafter by the national courts by general rules. One having a judgment in a national court may, therefore, resort to the same supplemental proceedings as if his judgment were in the state court, except that they must be conducted by and before the officers of the national courts.<sup>59</sup>

ceeding might be instituted, as prescribed in this section, is absent from the county, or, for any reason, unable or disqualified to act, the special proceeding may be instituted before a justice of the supreme court. In that case, if he does not reside within the judicial district, embracing the county in which the execution was issued, the order made, or warrant issued by him, must be returnable to a justice of the supreme court, residing in that district, or the county judge, or the special county judge, or the special surrogate of that or an adjoining county, as directed by the order or warrant."

<sup>56</sup> Ann. Ind. Stats., §§ 827, 828.

<sup>57</sup> *Burnes v. Cade*, 10 Bush, 251; *Hasty v. Simpson*, 77 N. C. 69.

<sup>58</sup> *Tompkins v. Purcell*, 12 Hun, 662.

<sup>59</sup> *Ex parte Boyd*, 105 U. S. 647; 26 Alb. L. J. 33; *Gregory v. Hewson*, 1 Bond, 277.

It has been held in New York that, supplemental proceedings being conducted in pursuance of a statutory authority, the existence of all the facts prescribed by the statute is essential to jurisdiction, and that, in the absence of such facts, the mere appearance of a judgment debtor, and his examination without objection, do not confer jurisdiction.<sup>60</sup> The judge to whom is given authority to compel the defendant to appear and answer is thereby invested with jurisdiction to entertain the proceedings to the end and until the debt shall have been paid, and to make all such further orders as shall become necessary and proper upon the facts disclosed. If he errs in any respect while acting within his jurisdiction, the remedy, if any exists, must be sought before him or in some appellate proceeding. If he commits a party for contempt, and relief is sought by habeas corpus, the inquiry, on the return of that writ, must be restricted to the jurisdiction of the judge, and at the hearing it will be presumed that all steps taken in aid of the execution were regular.<sup>61</sup>

**§ 398. Who may Prosecute.**—The statutes authorizing proceedings supplementary to execution usually provide that the remedies therein conferred may be prosecuted by “the judgment creditor.” Any person, therefore, who, in the state where these proceedings are sought, is, in law, regarded as “the judgment creditor,” is competent to institute them. It is doubtless essential that, in addition to being a judgment creditor, he shall be entitled to the ordinary remedies of judgment creditors, especially that of taking out execution and

<sup>60</sup> *Sackett v. Newton*, 10 How. Pr. 561; *Carter v. Clarke*, 7 Robt. 497; *De Comeau v. People*, 7 Robt. 498; see, however, *Wright v. Nostrand*, 94 N. Y. 45.

<sup>61</sup> *In re Morris*, 39 Kan. 28, 7 Am. St. Rep. 512.

seeking its satisfaction out of the property of his debtor. In New York, when judgment is recovered against an executor or administrator, execution may, by order of the surrogate, issue against the property of the decedent in the hands of the defendant. If the order of the surrogate is merely that an execution shall issue, it does not entitle the judgment creditor to institute proceedings supplementary to execution and to thereby compel an examination of persons alleged to be indebted to the decedent.<sup>62</sup>

In some states, the assignment of a judgment is not recognized at law. In these, the assignee cannot prosecute these proceedings, except in the name of his assignor.<sup>63</sup> In other states, such an assignment is valid at law, as well as in equity, and proceedings supplemental to execution can be conducted in the name and under the control of the assignee, whether the assignment was made prior or subsequent to the issue or return of the execution.<sup>64</sup>

In New York, an attorney has a lien for his costs, and may enforce judgment for the purpose of coercing the payment of such lien. He is, therefore, entitled to the benefit of proceedings supplementary to execution, and may pursue them to the extent of collecting his costs, though his client has become a bankrupt and no longer has any right to control the judgment.<sup>65</sup>

<sup>62</sup> *Collins v. Beebe*, 54 Hun, 318.

<sup>63</sup> *McGill v. Bone*, 13 Smedes & M. 592.

<sup>64</sup> *Ross v. Clussman*, 3 Sand. 676; 1 Code R., N. S., 91; *Hough v. Kohlin*, 1 Code R., N. S., 232; *Gleason v. Gage*, 7 Paige, 121; *Lindsay v. Sherman*, 1 Code R., N. S., 25; *Orr's Case*, 2 Abb. Pr. 457; *Frederick v. Decker*, 18 How. Pr. 96; *Crill v. Kornmeyer*, 56 How. Pr. 276; *Schmittzer v. Willner*, 27 N. Y. Supp. 970.

<sup>65</sup> *Merchant v. Sessions*, 5 N. Y. Civ. Proc. R. 24; *Russell v. Somerville*, 10 Abb. N. C. 395.

It was formerly held in New York that these proceedings could not be pursued by the administrator or executor of the judgment creditor.<sup>66</sup> Section 283 of the code of that state was in 1866 amended so as to permit the representatives of a deceased judgment creditor to avail themselves of supplementary proceedings. These representatives are understood<sup>67</sup> to be included within the definition of judgment creditors given in subdivision 13 of section 3343 of the Code of Civil Procedure, as follows: "The term 'judgment creditor' signifies the person who is entitled to collect, or otherwise enforce in his own right, a judgment for a sum of money, or directing the payment of a sum of money." It is true that section 283, referred to above, has been repealed, but personal representatives are entitled to executions on judgments recovered by the decedent,<sup>68</sup> and this certainly entitles them to the same remedies in aid of the writ to which the decedent would have been entitled had he survived. In Iowa, supplemental proceedings may be instituted by "the owner of the judgment."<sup>69</sup> If the plaintiff has been divested of his interest in the judgment by a transfer, whether voluntary or involuntary, he can no longer institute these proceedings. Hence, an order requiring the defendant to appear and submit to an examination concerning his property will be vacated, upon the ground that, before such order was granted a receiver of plaintiff's property had been appointed in supplemental proceedings against him.<sup>70</sup>

<sup>66</sup> *Wheeler v. Dakin*, 12 How. Pr. 537; *Jay v. Martine*, 2 Duer. 654.

<sup>67</sup> *Riddle and Bullard's Sup. Proc.* 36; *Walker v. Donovan*, 6 Daly, 552; *Coller v. De Revere*, 7 Hun, 61; *Scott v. Durfee*, 59 Barb. 390 n; *Pardee v. Tilton*, 20 Hun, 76.

<sup>68</sup> N. Y. C. C. P., § 1376.

<sup>69</sup> Iowa Code, § 4072.

<sup>70</sup> *Moore v. Taylor*, 40 Hun, 56.



**§ 398 a. Against Whom Supplemental Proceedings may be Prosecuted.**—In the absence of any special statutory limitation, these proceedings may be instituted against every person against whom an execution may lawfully issue, and over whom the court is not forbidden to exercise jurisdiction. Therefore married women, infants, and lunatics may be pursued by supplemental proceedings,<sup>71</sup> because valid judgments may be entered against them; while foreign ministers and consuls cannot be so pursued in the state courts, because those courts have no jurisdiction over them.<sup>72</sup> An action was brought on a judgment recovered against persons holding a trust fund, and a judgment was entered against them as trustees to be satisfied out of the trust fund in their hands. An execution having been returned unsatisfied, the plaintiff obtained an order in supplementary proceedings for the examination of the defendants upon oath concerning such fund, and, upon granting the order, the court declared that it was a mistake to suppose that trustees might not be subjected to such proceedings when the legal title to a fund was shown to be in their hands, and they were judgment debtors in their capacity as trustees with the duty of satisfying the judgment out of the fund in their hands. "Here then," said the court, "is a fruitless execution against the only property of the judgment debtors available to the plaintiff—a fund specifically devoted to the satisfaction of his judgment—and it were manifest injustice to refuse him its benefit. A supplementary proceeding is a remedial process, and a liberal construction should be indulged to uphold it."<sup>73</sup>

<sup>71</sup> Ante. § 396; *Petition of O'Brien*, 24 Wis. 547.

<sup>72</sup> *Griffin v. Dominguez*, 2 Duer, 656.

<sup>73</sup> *Matter of Gough*, 52 N. Y. Supp. 627.

Corporations are not, under the statutes of New York and New Jersey, liable to be proceeded against as judgment debtors by supplemental proceedings.<sup>74</sup> All corporations are, however, in New York, subject to supplementary proceedings in actions brought by the people of the state, and foreign corporations which do not do business within the state, nor have therein a business or fiscal agency or an agency for the transfer of their stock, are subject to these proceedings to the same extent as natural persons.<sup>75</sup> Unless specially exempted by statute, corporations as well as natural persons are subject to these proceedings.<sup>75a</sup> In Iowa an execution against a corporation could be levied upon the private property of its stockholders to the extent of unpaid instalments due on stock owned by them. It was held, notwithstanding the requisite proceedings had been taken against stockholders to entitle the plaintiff to have the execution on a judgment against the corporation levied upon their property, that they were not judgment debtors, and could not be required to appear and answer as such.<sup>76</sup> Property in the custody of the law is not subject to execution. Hence, a receiver cannot be brought before the court by supplemental proceedings and required to answer respecting moneys owed by him as such receiver to the judgment debtor.<sup>77</sup>

<sup>74</sup> *Levy v. Swick P. Co.*, 39 N. Y. Supp. 409; *Conner v. Todd*, 48 N. J. L. 361; N. Y. Code Civ. Proc., § 2463.

<sup>75</sup> C. C. P. N. Y. §§ 1812, 2463; *Logan v. McCall P. Co.*, 110 N. Y. 447.

<sup>75a</sup> *La Fountain v. Southern U. Assn.*, 79 N. C. 514; *Tompkins v. Floyd Cd. Agl. Assn.*, 19 Ind. 197; *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661; *Estey v. Fuller I. Co.*, 82 Ia. 678; *South Bend T. M. Co. v. Pierre etc. I. Co.*, 4 S. D. 173; *Sage v. Railroad Co.*, 47 Fed. Rep. 3.

<sup>76</sup> *Bailey v. D. W. Ry. Co.*, 13 Iowa, 97.

<sup>77</sup> *Smith v. McNamara*, 15 Hun, 447. This we doubt. Where

In Indiana, where proceedings supplementary to execution are regarded as new and independent actions, it is possible to bring before the court all parties interested in, or claiming adverse titles to, or liens upon, the property involved, to the end that the court may dispose of all questions as completely as upon a creditor's suit in equity, and if at first the proper parties are not before the court, it may order new parties to be brought in, from time to time, as may appear essential to the effective exercise of its jurisdiction.<sup>78</sup> Where the proceedings are deemed but a continuation of the original suit, the authority to bring new parties before the court is more restricted and, hence, it may often be necessary to resort to a creditors' bill.

All persons against whom writs of execution may properly issue may be required to appear and submit to an examination and to such order as the court may, after the examination, deem proper, and such third persons as are charged with owing debts to the defendant in execution, or as having his property in their possession or under their control may also, in most of the states, be compelled to appear and submit to an examination respecting the same. To avoid undue harshness, debtors and others are usually not required to appear before any officer of a county other than that in which they reside or have their place of business.<sup>79</sup> Within the meaning of the statutes controlling this

property is in the custody of the law, proceedings supplementary to execution will not enable the plaintiff to disturb that custody. But may not the judgment debtor be compelled to assign to a receiver his interest in such property, and, if so, may not the receiver, or any other witness, be required to testify respecting it?

<sup>78</sup> American W. B. Co. v. Clark, 123 Ind. 230.

<sup>79</sup> N. Y. C. C. P., § 2458; Schenck v. Erwin, 38 N. Y. St. R. 603; 21 Clv. Pro. R. 96; 60 Hun, 361; 15 N. Y. Supp. 55.

question, a party may, however, have two or more residences, and may, hence, be called before a court of a county in which he has his residence a part of the time and wherein he is found when the order to appear is served upon him, though he has another residence which may properly be called his home.<sup>80</sup>

§ 398 b. Witnesses may be Examined in proceedings supplemental to the execution, on behalf of either party, and on such examination they must answer all relevant questions propounded to them.<sup>81</sup> If they assert title in themselves to property which the plaintiff is seeking to subject to the payment of his judgment, he is not bound by their general statement that they own or have purchased such property, and obliged to discontinue his examination because of such statement.<sup>82</sup> By such statement they place themselves in the attitude of adverse witnesses, and must submit to the most thorough cross-examination with respect to the good faith of their alleged acquisition.<sup>83</sup> Witnesses may, by subpoenas duces tecum, be required to produce on their examination books and papers under their control.<sup>84</sup> The statutes very generally require witnesses to answer respecting fraudulent transfers, whether their answers tend to criminate them or not, and prohibit the use of such answers as evidence in

<sup>80</sup> *Re Rowland*, 47 N. Y. Supp. 493.

<sup>81</sup> *Graves v. White*, 12 How. Pr. 33; *McCullough v. Clark*, 41 Cal. 302; Cal. Code Civ. Proc., sec. 718.

<sup>82</sup> *Stanford v. Carr*, 2 Abb. Pr. 462.

<sup>83</sup> *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493; *Mechanics' & F. Bank v. Healy*, 14 Week. Dig. 120; *Toledo etc. R. W. Co. v. Howes*, 68 Ind. 458; *Blipus v. Deer*, 106 Ind. 135; *Coates v. Wilkes*, 92 N. C. 376.

<sup>84</sup> *Holmes v. Stietz*, 6 N. Y. C. P. 362, note; *Riddle and Bullard's Sup. Proc.*, 152; *Coates v. Wilkes*, 92 N. C. 376.

any criminal action or proceeding against the person answering.<sup>85</sup>

Whether a wife may be examined in proceedings against a husband, or a husband in a proceeding against his wife, is doubtful. Where either is called as a witness against the other, we think his or her testimony must be excluded under statutes forbidding either to testify against the other without his or her consent. Instead of calling either as a witness, he or she may be directed to appear and answer as a third person on a showing that he or she has property in his or her possession or control belonging to the judgment debtor and subject to examination. Even when so called for examination, it has been held that neither need answer respecting the property of the other.<sup>86</sup> The weight of authority is, however, to the contrary.<sup>87</sup> A statute exonerating one spouse from testifying against the other cannot have been intended as affording such an asylum for fraud as must inevitably be secured if one can place in the possession of the other property subject to execution, and the latter be exempt from answering any inquiries upon the subject.

We have seen that persons ordered to be examined in supplementary proceedings are not ordinarily required to appear outside the counties of their residence or in which they have an office for the transaction of their business. The place of examination being thus fixed, it follows, as a matter of neces-

<sup>85</sup> *Millar v. Weaver*, 53 N. Y. Supp. 259; N. Y. Code Civ. Proc., § 2460; *Barber v. People*, 17 Hun, 366; Neb. Code Civ. Proc., § 536; *Marx v. Spaulding*, 43 Hun, 365; post, § 404.

<sup>86</sup> *Berles v. Adsit*, 102 Mich. 495.

<sup>87</sup> *Thompson v. Silvers*, 59 Ia. 670; *Lockwood v. Worstitt*, 15 Abb. Pr. 430, note; *Frankenthal v. Solomonson*, 20 Wash. 460, 72 Am. St. Rep. 116; *Petition of O'Brien*, 24 Wis. 547.

sity, that a like exemption cannot apply to the witnesses. Otherwise if the party to be examined and the witnesses to be called resided in different counties, it would be impossible to examine both in the same proceeding. Hence, if a witness may, in other cases, be compelled to appear as such beyond the county of his residence, he is not excused from appearing in a proceeding supplementary to execution.<sup>88</sup>

PROCEEDINGS AGAINST THE DEFENDANT.

§ 399. **Facts Necessary to Authorize.**—We shall now treat of that proceeding supplementary to execution in which it is sought to bring the defendant before a court or judge, for the purpose of compelling him to answer concerning his property. The statutes upon this subject make provisions for two classes of cases. In the cases of the first class, there is no suggestion that the defendant has any particular property, and the object of the proceeding is merely to compel him to appear and submit to an examination. The cases of the second class proceed upon the ground that there is an execution in the officer's hands against the defendant, and that the latter has property which he unjustly refuses to apply to the satisfaction of the writ. We shall now consider cases of the first class. The facts necessary to authorize this proceeding in these cases are: 1. That a judgment for money should have been entered; 2. That an execution against the property of the debtor should have been issued to the proper county; 3. That such execution should have been returned unsatisfied, in whole or in part.<sup>89</sup> The issue

<sup>88</sup> *Foster v. Wilkinson*, 37 Hun, 242.

<sup>89</sup> § 2435, N. Y. Code; § 714, Cal. Code Civ. Proc.; § 4072, Iowa Code; § 312, S. C. Code Civ. Proc.; Ohio Rev. Stats., § 5472; Gen. Stats. Nev., § 3262; Burns' Ann. Stats. Ind., § 827; Ann. Stats. Wis., § 3029; § 264, N. C. Code Civ. Proc., § 533, Neb. Code Civ. Proc.

and return of the execution are indispensable.<sup>90</sup> Without such return, the court has not jurisdiction to proceed, though the judgment debtor has appeared in response to the order and submitted to an examination. "Where the fact necessary to give the tribunal jurisdiction—as, in this case, the return of a writ wholly or partly unsatisfied—does not exist, the defect cannot be waived, for consent cannot confer jurisdiction not vested by law. The objection can be taken at any time."<sup>91</sup> Whether an execution has issued and been returned must ordinarily be proved by the best evidence, namely, the writ itself, and the absence of such proof cannot be supplied by an affidavit filed by the creditor stating such issuing and return.<sup>92</sup> No doubt the return of the execution ought to be made in good faith, because the debtor had no property subject to it of which the officer could obtain any knowledge. It is not generally regarded as indispensable that the writ should have remained in the officer's hands until the return day. If, before the return day, the officer becomes satisfied, after due search and inquiry, that he

<sup>90</sup> *In re Remington*, 7 Wis. 643; *Second Ward Bank v. Upmann*, 12 Wis. 499; *Edgerton v. Hanna*, 10 Ohio St. 323; *Kiser v. Sawyer*, 4 Kan. 503; *Sackett v. Newton*, 10 How. Pr. 560; *McKelthan v. Walker*, 66 N. C. 95; *Chanute v. Martin*, 25 Ill. 63; *Lee v. Harbach*, 2 West. L. M. 527; *Owen v. Duplignac*, 9 Abb. Pr. 180; 17 How. Pr. 512; *Hutchison v. Symons*, 67 N. C. 156; *Dillman v. Dillman*, 90 Ind. 585; *Cushman v. Gephart*, 97 Ind. 46; *McCormick etc. Co. v. Gates*, 75 Ia. 343; *Machine Co. v. Wait*, 24 Kan. 136; *Berles v. Comstock*, 104 Mich. 129; *Barber v. Briscoe*, 9 Mont. 341; *Canandaigua F. N. B. v. Martin*, 49 Hun, 571; *Miller v. Snyder*, 133 Pa. St. 23; *Klepsch v. Donald*, 18 Wash. 150. Fact that sheriff has levied upon, and is about to sell real estate, will not dispense with the necessity for a return of the writ. *Marx v. Spaulding*, 16 Abb. N. C. 309; 35 Hun, 478, affirmed 99 N. Y. 675. *Contra*, *Forbes v. Spaulding*, 52 N. Y. Sup. Ct. 166; *Riddle and Bullard's Sup. Proc.* 72-74.

<sup>91</sup> *Jennings v. Lancaster*, 37 N. Y. Supp. 196.

<sup>92</sup> *Balz v. Bennighof*, 5 Ind. App. 522.

can discover no property, there is no reason why he should not at once return the writ; and if he does so return it, his return will, in most of the states, support supplemental proceedings.<sup>93</sup> Certainly, a fraudulent and collusive return, made at the instigation of the plaintiff, could be set aside upon the application of the defendant.<sup>94</sup> The later cases, however, hold that as long as the defendant permits the return to stand, he cannot attack it in proceedings supplemental to execution.<sup>95</sup> Where the return appears, however, to have been made before the return day upon the direction of the plaintiff or his attorney, suspicion is cast upon it, and it must, in some of the states, be supported by evidence showing that the return is the act of the sheriff made after search, without success, for property to satisfy the writ, or, in other words, that the plaintiff has in good faith exhausted his remedy under his writ.<sup>96</sup>

The pendency of supplemental proceedings does not deprive the plaintiff of his right to issue a second execution;<sup>97</sup> nor does the fact that an alias execution has

<sup>93</sup> *Second Ward Bank v. Upmann*, 12 Wis. 499; *Spencer v. Cuyler*, 17 How. Pr. 157; 9 Abb. Pr. 382; *Storrs v. Kelsey*, 2 Palge, 418; *Engle v. Bonneau*, 2 Sand. 679; *Livingstone v. Cleaveland*, 5 How. Pr. 396; *Utica City Bank v. Buel*, 9 Abb. Pr. 385; 17 How. Pr. 498; *Tyler v. Willis*, 33 Barb. 327; *Tyler v. Whitney*, 12 Abb. Pr. 465; *Fenton v. Flagg*, 24 How. Pr. 499; *High Rock K. Co. v. Bronner*, 43 N. Y. Supp. 684.

<sup>94</sup> *Spencer v. Cuyler*, 17 How. Pr. 157; 9 Abb. Pr. 382; *Pudney v. Griffiths*, 15 How. Pr. 410; 6 Abb. Pr. 211; *Nagle v. James*, 7 Abb. Pr. 234.

<sup>95</sup> *Sherman v. Carvill*, 73 Ind. 126; *Forbes v. Waller*, 25 N. Y. 430; *Sperling v. Levy*, 10 Abb. Pr. 426; *Flint v. Webb*, 25 Minn. 263.

<sup>96</sup> *Pecos I. Co. v. Olson*, 63 Ill. App. 313; *Dunderdale v. Westinghouse*, 51 Ill. App. 467; *Scheubert v. Honel*, 50 Ill. App. 597; 152 Ill. 313.

<sup>97</sup> *Fellerman's Case*, 2 Abb. Pr. 155; *Lillendahl v. Fellerman*, 11 How. Pr. 528; *Sale v. Lawson*, 4 Sand. 718.



been issued and not returned suspend the plaintiff's right to prosecute supplemental proceedings.<sup>98</sup> A defect in the return cannot be urged by the defendant as a ground for vacating an order appointing a receiver, when all the facts necessary for the previous action of the court were stated in the affidavit, and the debtor appeared and submitted to an examination without objection.<sup>99</sup>

**§ 400. Affidavit.**—The statutes providing for this proceeding do not, as a general rule, state the means by which the necessary facts shall be brought to the attention of the court or judge. Where the proceeding is conducted before the same court in which the judgment was rendered, we can see no reason why the papers on file ought not to be regarded as the very best evidence of the principal facts required to entitle the plaintiff to an order for the examination of the defendant. Every fact essential to the proceeding ordinarily appears from those papers; and in some of the states they are obviously sufficient to authorize the order of examination, and upon principle we think such order should be based only upon them.<sup>100</sup> In some of the states, the statute provides that the facts may be proved "by affidavit, or other competent written evidence."<sup>101</sup> The tendency of the decisions has been to ignore this explicit provision of the statutes by exacting an affidavit in every instance, and, furthermore, to construe the affidavit with strictness when made, and to hold that the court is without power to proceed

<sup>98</sup> *Farquharson v. Kimball*, 18 How. Pr. 83; 9 Abb. Pr. 385.

<sup>99</sup> *Baker v. Herkimer*, 43 Hun, 86.

<sup>100</sup> *Sherman v. Carvill*, 73 Ind. 126; *Collins v. Angell*, 72 Cal. 512; Cal. Code Civ. Proc., § 714.

<sup>101</sup> N. Y. Code Civ. Proc., § 2435.

when the affidavit is substantially defective,<sup>102</sup> though the matter of fact which it fails to clearly or sufficiently disclose is evidenced by the writings constituting a part of the record, or at least of the papers on file in the case, all of which must, according to the ordinary rules, be deemed better evidence of their own contents than any affidavit of any person can be. The affidavit may be made by the plaintiff, or his agent or attorney, or by any other person conversant with the facts stated therein. When not made by the plaintiff, it must show that the person making it is acquainted with the facts, and that he is not acting as an intermeddler, but by the authority of the plaintiff.<sup>103</sup> This statement must, perhaps, be accepted with the qualification that, when an affidavit does not on its face purport to be made on information and belief, and he who makes it states the facts positively and without anything to indicate that he bases his statement otherwise than upon his own knowledge, it will be assumed that he is acquainted with the facts to which he deposes.<sup>104</sup>

If the proceeding may properly be regarded as resting on the affidavit alone, it is evident that it must state the facts designated in the statute; and we see no reason why the courts should supplement the statute, and require the statement of something not exacted by its provisions. The statutes authorizing an order

<sup>102</sup> *Lindsay v. Sherman*, 5 How. Pr. 308, 1 Code R., N. S., 25; *Frederick v. Decker*, 18 How. Pr. 93; *McGuire v. Hudson*, 16 N. Y. Supp. 392.

<sup>103</sup> *Conway v. Hitchins*, 9 Barb. 378; *Lindsay v. Sherman*, 1 Code R., N. S., 25; *Hough v. Kohlin*, 1 Code R., N. S., 232; *Hawes v. Barr*, 7 Robt. 452; *Brown v. Walker*, 8 N. Y. Supp. 59. The proceedings prior to the order to appear are *ex parte*. *Goodall v. Demarest*, 2 Hilt. 534.

<sup>104</sup> *Bruen v. Nickels*, 51 N. Y. Supp. 352, 30 App. Div. 396; *Laudenberg v. Commercial Bank*, 5 App. Div. 219; *Crown v. Vail*, 51 Hun. 204.

for the examination of a judgment debtor, with a view of discovering assets subject to execution, substantially agree in declaring that the judgment creditor is entitled to such order after the return, wholly or partly unsatisfied, of an execution against property issued upon a judgment. Any affidavit ought, therefore, to be adjudged sufficient which affirms—1. The rendition of the judgment, describing it with respect to parties, amount, et cetera; 2. That an execution against the defendant's property issued on such judgment, stating the date of such issuance; and 3. That the judgment remains unsatisfied in whole or in part; and 4. Such allegations concerning the residence or place of business of the person sought to be examined as will enable the judge to determine before what judge and in what county he may be required to appear. The tendency of the decisions is, we think, to exact greater particularity than is required by the statutes.<sup>106</sup> With re-

<sup>106</sup> Thus it was said in *Hawes v. Barr*, 7 Robt. 454, that if the judgment creditor "elects to take the shorter and more summary and direct mode of supplemental proceedings, he exposes himself to all the inconvenience of their incompleteness in giving a perfect remedy. He subjects himself to the necessity of detailing with great circumstantiality, in the affidavit on which he applies for an order, the facts on which the jurisdiction of the officer to whom he applies rests. For the proceedings are before a judge merely, and not before the court, which can make no order in them, so that a misdescription of the judgment, a failure to show the rights of the applicant to apply, or to show that the execution was issued against property, has been held fatal. Nothing, therefore, can be taken by intendment in favor of the applicant." If these remarks, so far as they refer to the "great circumstantiality" required in the affidavit, are true at the present time, their truth is dependent upon judicial interpolation into the statute of that which the legislature never inserted—upon an irresistible tendency to make complex and difficult that which was designed to be simple and easy. "The affidavit must name the parties in whose favor and against whom the judgment was rendered, as well as the court, and when the same was recovered, the amount of the recovery, the county or office where the judgment roll is filed, or where the transcript is filed, if the

spect to mere variances in the affidavit in describing the judgment or execution, or in failing to indorse on the affidavit the attorney's name and address, where such indorsement is required to be made by statute or rule of court, it is conceded that irregularities of this character do not affect the judgment of the court, and, hence, are not fatal to the proceeding.<sup>106</sup> As to matters of substance, however, as already suggested, the courts are inclined to require particularity in the affidavit and to exact a statement therein of all the facts essential to support the order for the examination of the judgment debtor or other person sought to be proceeded against.<sup>107</sup> If an assignee of a judgment makes the affidavit, it has been held that it should show by what right he moves in the matter;<sup>108</sup> and if it is made by an agent, that it should show the nature of his agency, and that it included the power to act in the proceeding.<sup>109</sup> The affidavit should be positive and state the facts as of the affiant's own knowledge, or, if it states them upon information and belief, should disclose the source and nature of the information, to permit the judge to determine therefrom whether the facts are probably as stated and will warrant the relief sought.<sup>110</sup> Facts must not be stated in the

judgment was rendered in a court not of record at the time of such filing." Riddle and Bullard's Sup. Proc., 89, 90.

<sup>106</sup> Dorsey v. Cummings, 48 Hun, 76; Batchelder v. Nugent, 24 N. Y. Supp. 828; Matter of Hatfield, 45 N. Y. Supp. 270, 675.

<sup>107</sup> McGuire v. Hudson, 16 N. Y. Supp. 392.

<sup>108</sup> Lindsay v. Sherman, 5 How. Pr. 308; 1 Code R., N. S., 25; Frederick v. Decker, 18 How. Pr. 96.

<sup>109</sup> Hawes v. Barr, 7 Robt. 452. But an affidavit by one who describes himself as the attorney of plaintiff is sufficient. Miller v. Adams, 52 N. Y. 409.

<sup>110</sup> Matter of Leslie, 40 N. Y. Supp. 1103; Matter of Parrish, 50 N. Y. Supp. 735, 28 App. Div. 22; Bowery Bank v. Widmayer, 9 N. Y. Supp. 629.

disjunctive. Hence, an affidavit affirming that the writ was delivered to the sheriff of S. county, "where the said judgment debtor then resided and where the judgment roll was filed, then resided and yet resides, or has at the commencement of this proceeding a place for the regular transaction of business in person," is fatally defective, and any order based thereon should be vacated.<sup>111</sup> The decisions in New York also seem to require the affidavit to state the facts authorizing the execution to issue, as that the judgment had been docketed,<sup>112</sup> and in the case of a justice's judgment, that a transcript had been filed.<sup>113</sup> The affidavit must also contain such statements respecting the residence or place of business of the person sought to be examined that it can be ascertained therefrom within what county and before what judge he may be required to appear and submit to an examination.<sup>114</sup> In North Carolina, in addition to the matters designated in the statute, the affidavit must show "the nonexistence of any equitable estates in law within the lien of the judgment, and the existence of property, choses in action, and things of value, unaffected by any lien and incapable of levy."<sup>115</sup> The code of that state has been amended, so as to entitle a creditor to an order of examination, although the judgment debtor may have an equitable estate in lands sub-

<sup>111</sup> *Zelle v. Vroman*, 50 N. Y. Supp. 836; *Leonard v. Bowman*, 15 N. Y. Supp. 822.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Kennedy v. Thorp*, 3 Abb. Pr., N. S., 181; *Bingham v. Disbrow*, 14 Abb. Pr. 251; 37 Barb. 24.

<sup>114</sup> *Pouder v. Tate*, 111 Ind. 148; *McKinney v. Snider*, 116 Ind. 160; *Matter of Gagnon*, 52 N. Y. Supp. 309; *Zelle v. Vroman*, 50 N. Y. Supp. 836; *Arnot v. Wright*, 55 Hun, 561.

<sup>115</sup> *Hinsdale v. Sinclair*, 83 N. C. 338.

ject to the lien of the judgment, or may have choses in action and other things of value unaffected by such lien and incapable of levy. It is still, however, necessary for the affidavit to show that the debtor has no property subject to execution and against which the plaintiff has an ample remedy by the levy of his writ.<sup>116</sup> But though it appears that the defendant has property subject to execution, he may maintain a supplemental proceeding on showing that the defendant refuses to apply such property toward the satisfaction of the judgment, for it may be that, for some reason, the sheriff cannot find or levy upon such property.<sup>117</sup>

In New York, the affidavit was once considered as the foundation of the judge's authority to act; and it was there held that if an affidavit were defective, its defects could not be supplied by an amendment, because the defective affidavit gave the judge no jurisdiction of the proceeding.<sup>118</sup> This position seems untenable.<sup>119</sup> The statute requires certain facts to exist. If these facts do exist, the right of the judge to proceed ought to be conceded, whether the facts were made known to him by affidavit, or by any other competent evidence.<sup>120</sup> It is obvious that, as this proceeding is prosecuted to enable the plaintiff to ascertain whether the defendant has any property, the former ought not to be required in his affidavit to affirm the existence of the very fact which the proceeding is instituted to discover. Therefore, it is now settled that the affidavit

<sup>116</sup> *Hackney v. Arrington*, 99 N. C. 110.

<sup>117</sup> *Farmers' etc. N. B. v. Burns*, 109 N. C. 105.

<sup>118</sup> *Kennedy v. Weed*, 10 Abb. Pr. 62; *Simpkins v. Page*, 1 Code R. 107.

<sup>119</sup> *Hutchinson v. Trauerman*, 112 Ind. 21; *Burkett v. Bowen*, 118 Ind. 379.

<sup>120</sup> *Scott v. Durfee*, 59 Barb. 390.

need not state that the defendant has property subject to execution.<sup>121</sup> Where the writ has been returned wholly or partly unsatisfied, and in those cases where it is necessary to show that the defendant has property subject to execution which he refuses to apply thereto, the statement may be made in general terms and need not undertake to specifically describe the property.<sup>122</sup> In addition to the matters hereinbefore stated, the affidavit, or other proof, must, in New York, show that the judgment was rendered upon "the debtor's appearance, or personal service of summons upon him, for a sum not less than twenty-five dollars"; that the execution was issued out of a court of record, "to the sheriff of the county where the debtor has, at the time of the commencement of the special proceeding, a place for the regular transaction of business in person; or if the judgment debtor is then a resident of the state, to the sheriff of the county where he resides; or if he is not then a resident of the state, to the sheriff of the county where the judgment roll is filed; unless the execution was issued out of a court other than that in which the judgment was rendered, and in that case, to the sheriff of the county where the transcript of the judgment is filed." <sup>123</sup>

**§ 401. The Order to Appear, and Objections Thereto.—** If the affidavit discloses all the facts essential to entitle the judgment creditor to an order of examination, and it is further supported by a return of nulla bona

<sup>121</sup> *Kay v. Vischers*, 9 Minn. 270; *Heroy v. Gibson*, 10 Bosw. 591; *Flint v. Webb*, 25 Minn. 263; *Hough v. Kohlin*, 1 Code R., N. S., 232; *Conway v. Hitchins*, 9 Barb. 378; *Lindsay v. Sherman*, 5 How. Pr. 808; *Hatch v. Weyburn*, 8 How. Pr. 163; *Anonymous*, 3 Sand. 725; 1 Code R., N. S., 113. Contra, *Tillow v. Vere*, 1 Code R. 130; *Hutchison v. Symons*, 67 N. C. 156; *Hinsdale v. Sinclair*, 83 N. C. 338.

<sup>122</sup> *Magruder v. Shelton*, 98 N. C. 545, 2 Am. St. Rep. 349.

<sup>123</sup> N. Y. Civ. Code, § 2458; *Kellogg v. Freeman*, 2 City Ct. 147.

on the execution, he has an absolute right to such order of which he cannot be deprived by any counter-affidavit on the part of the defendant to the effect that he has property subject to execution upon which a levy can be made. The court will not go behind the return of the officer, unless upon motion to set it aside. "The judgment debtor's affidavit to the possession of property ought not to hinder the examination. If he has property sufficient to satisfy the execution in full, he can sell it and satisfy the judgment. If he does not do so, it is prima facie evidence that the property will not satisfy the judgment, and the creditor should be afforded every facility in his inquiry for further assets." <sup>124</sup>

In some of the states, the clerk issues a summons commanding the defendant to appear.<sup>125</sup> The more usual practice is to procure an order from the judge upon the filing of the necessary affidavit. This order should briefly recite the facts stated in the affidavit, and then command the defendant to appear before the judge or referee. It should state the time and place at which the defendant must appear. If it fails to state either,<sup>126</sup> or is returnable upon Sunday,<sup>127</sup> it is void, and may be disregarded. Mere defects or irregularities in the order do not usually render it void, and can be taken advantage of only by some motion made in due time.<sup>128</sup> Under most of the statutes the defendant cannot be required to appear before any judge

<sup>124</sup> Eleventh Ward Bank v. Heather, 48 N. Y. Supp. 449.

<sup>125</sup> Carpenter v. Vanscoten, 20 Ind. 50; Schultz v. Andrews, 54 How. 376.

<sup>126</sup> Kelty v. Yerby, 81 How. Pr. 95.

<sup>127</sup> Arctic Ins. Co. v. Hicks, 7 Abb. Pr. 204; Gould v. Spencer, 5 Paige, 541.

<sup>128</sup> Hilton v. Patterson, 18 Abb. Pr. 245.



or court out of the county in which he resides or transacts his business.<sup>129</sup> This rule is not applicable where the defendant changes his residence after the issuance of the execution.<sup>130</sup> Unless there is an entire absence of jurisdiction, the order must be obeyed. If there are any errors or irregularities, they will not justify disobedience of the order;<sup>131</sup> but they may be used as grounds for objecting to the order and procuring its vacation, if of sufficient gravity.<sup>132</sup> The defendant cannot obtain a vacation of the order by showing that the judgment or execution was irregular or erroneous.<sup>133</sup> The order to appear may—and, for the security of the plaintiff, it ought to—contain a provision restraining the defendant from making any transfer or other disposition of his assets.<sup>134</sup>

§ 401 a. Arrest of Defendant.—Under the code of New York the judgment creditor is entitled to a warrant for the arrest of the judgment debtor, on showing, by affidavit, in addition to the matters mentioned in sections 400 and 406, the further facts “that there is danger that the judgment debtor will leave the state or conceal himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of the judgment.”<sup>135</sup> This warrant may

<sup>129</sup> Cal. Code Civ. Proc., § 714; Wis. Ann. Stats., § 3021; Ohio Rev. Stats., § 5472; *Wilson v. Andrews*, 9 How. Pr. 89; *Hersenheim v. Hooper*, 1 Duer, 594.

<sup>130</sup> *Bingham v. Disbrow*, 14 Abb. Pr. 251; 37 Barb. 24.

<sup>131</sup> *Shults v. Andrews*, 54 How. Pr. 378; *Arctic F. I. Co. v. Hicks*, 7 Abb. Pr. 204.

<sup>132</sup> *Courtois v. Harrison*, 1 Hilt. 109; 12 How. Pr. 359; 3 Abb. Pr. 96.

<sup>133</sup> *Lederer v. Ehrenfeld*, 49 How. Pr. 403; *People v. Oliver*, 66 Barb. 570; *Union Bank v. Sargent*, 53 Barb. 422; 35 How. Pr. 87.

<sup>134</sup> 4 Wait's Pr. 140; *People v. Kingsland*, 3 Abb. App. 526; *Deposit Bank v. Wickham*, 44 How. Pr. 421.

<sup>135</sup> N. Y. Code Civ. Proc., § 2437.

be issued either before the order to appear and submit to an examination has been made, or thereafter at any time before the close of the examination.<sup>136</sup> It, therefore, follows that it and the order for the examination are so far independent of each other that one may be improper and the other proper, and an error in granting the one does not impair the other, and the one may be vacated and the other left in force.<sup>137</sup> When, pursuant to such warrant, the defendant is brought before the judge, he may be ordered, if it appears that there "is danger that he will leave the state or conceal himself, and that he has property which he unjustly refuses to apply to the satisfaction of the judgment, . . . . to give an undertaking, with one or more sureties, in a sum fixed and within a time specified in the order to the effect that he will, from time to time, as the judge directs, attend before the judge or referee, and that he will not, until discharged from arrest by virtue of the warrant, dispose of any of his property not exempt from seizure. . . . . If he fails to comply with the order, the judge must forthwith, by warrant, commit him to prison, there to remain until the close of the examination or the giving of the required undertaking." <sup>138</sup>

§ 402. Service of the Order.—The statutes usually contain no provisions regarding the method by which the order to appear may be served. Personal service is undoubtedly sufficient.<sup>139</sup> It should, in New York, be made by exhibiting the original, and by delivering

<sup>136</sup> N. Y. Code Civ. Proc., § 2438; *Marriage v. Woodruff*, 77 Ia. 291.

<sup>137</sup> *Teats v. Bank of Herrington*, 58 Kan. 721; *Frost v. Craig*, 9 N. Y. Supp. 528.

<sup>138</sup> N. Y. Code Civ. Proc., § 2440.

<sup>139</sup> *People v. Hurlburt*, 5 How. Pr. 446.

a copy of the order to the defendant.<sup>140</sup> In North Carolina, service of the order to appear may be made on the judgment debtor by leaving it at the residence of his wife.<sup>141</sup> As the object of the service is to obtain jurisdiction over the defendant, it may be waived, and it becomes unnecessary if he is in court when the order is made, and with knowledge thereof, appears and submits to an examination.<sup>142</sup> Until, however, the order has been served, or the defendant has voluntarily appeared, the court seems to have no authority to proceed. Hence, if a third person is subpoenaed as a witness, he may, on being brought before the court, refuse to answer questions propounded to him, on the ground that, because of the failure to serve the order on the defendant, no proceeding is pending against him in which a witness can be called and require to answer.<sup>143</sup> As the law does not authorize the sheriff to serve the order in his official capacity, service by him cannot be proved by his certificate thereof. It must be established in the same manner as though made by a private individual.<sup>144</sup> The defendant need not be served with a copy of the affidavit on which the order was issued.<sup>145</sup> The Code of Civil Procedure of New York provides that "an injunction order, or an order requiring a person to attend and be examined, must be served as follows: 1. The original order, under the hand of the judge making it, must be exhibited to the person to be served; 2. A copy thereof, and of the affidavit upon which it was

<sup>140</sup> *Billings v. Carver*, 54 Barb. 40; Code Civ. Proc. N. Y., § 2452.

<sup>141</sup> *Turner v. Holden*, 109 N. C. 182.

<sup>142</sup> *McDonnell v. Henderson*, 74 Ia. 619.

<sup>143</sup> *People v. Warner*, 51 Hun, 53.

<sup>144</sup> *Utica City Bank v. Buell*, 9 Abb. Pr. 385.

<sup>145</sup> *Green v. Bullard*, 8 How. Pr. 313; *Farqueharson v. Kimball*, 9 Abb. Pr. 385, note.

made, must be delivered to him.”<sup>146</sup> Service of an order made after the time specified for the appearance of the defendant is void. He need pay no attention to it.<sup>147</sup>

**§ 403. Appearing Before the Judge or Referee.**—When the defendant appears at the time and place appointed, and finds no judge or referee there, he is not at liberty at once to go away. He must wait a reasonable time for the appearance of the officer.<sup>148</sup> The officer may altogether fail to appear. In such an event, it is not clearly settled whether the proceeding abates or not. The probability, however, is, that it does not abate, but may be continued by prompt action upon the part of the plaintiff in procuring and serving an order for the defendant to appear at some subsequent time.<sup>149</sup> The statutes usually require that the order for the examination of a debtor or other person shall command him to attend and be examined either before the judge to whom the order is returnable or before a referee designated therein.<sup>150</sup> This language necessarily confers power upon the judge to whom the application for an order of examination is made to appoint a referee before whom the examination shall take place.<sup>151</sup> The order appointing the referee need not be incorporated in the order for the examination.<sup>152</sup> The powers of the referee are usually restricted to the proceedings essential to an examination, and, hence, include that

<sup>146</sup> N. Y. Code Civ. Proc., § 2452.

<sup>147</sup> *Henderson v. Stone*, 40 How. Pr. 333; 2 Sweeny, 468.

<sup>148</sup> *Reynolds v. McElhone*, 20 How. Pr. 457.

<sup>149</sup> *Holstein v. Rice*, 15 Abb. Pr. 307; 24 How. Pr. 135; *Allen v. Staring*, 26 How. Pr. 57.

<sup>150</sup> Code Civ. Proc. Cal., § 714; Code Civ. Proc. N. Y., § 2442.

<sup>151</sup> *Howe v. Welch*, 11 N. Y. Civ. Pro. Rep. 444.

<sup>152</sup> *Lewis v. Penfield*, 39 How. Pr. 490.

of issuing subpoenas or directions to appear before him,<sup>153</sup> to administering oaths, and conducting the examination, or, more accurately speaking, of permitting it to be conducted before him, for his functions are quasi judicial, and he should not take upon himself "the part of prosecutor, and press questions suggested of his own motion to an inquisitorial extent."<sup>154</sup> Where the examination is conducted before a referee, the various orders of adjournment should be made by him.<sup>155</sup> Orders of adjournment should be made from day to day; and unless made, the jurisdiction of the judge terminates, and the examination cannot be renewed at a future time.<sup>156</sup> The referee has no power to make any order as to the result of his examination, but must certify the evidence and other proceedings before him to the judge, who is alone authorized to take action thereon.<sup>157</sup>

**§ 403 a. Grounds for Discharging the Defendant Without Examination.**—We apprehend that the defendant may avoid an examination—1. By showing from the moving papers or proofs that the order for his examination was irregularly or improvidently obtained, and that it ought, therefore, to be vacated; or 2. By rebutting or confessing and avoiding the *prima facie* case made by the plaintiff. Thus, in rebuttal he may show that there had never been any valid judgment against

<sup>153</sup> *Marriage v. Woodruff*, 77 Ia. 291; *People v. Ball*, 37 Hun, 245; *Knowles v. De Lazare*, 3 How., N. S., 85.

<sup>154</sup> *People v. Leipzig*, 52 How. Pr. 412.

<sup>155</sup> *Mason v. Lee*, 23 How. Pr. 466.

<sup>156</sup> *Ammidon v. Wolcott*, 15 Abh. Pr. 314; *Hawes v. Barr*, 7 Robt. 453; *Carter v. Clarke*, 7 Robt. 490; *Squire v. Young*, 1 Bosw. 690.

<sup>157</sup> *Kennedy v. Norcott*, 54 How. Pr. 87; *Ball v. Goodenough*, 37 How. Pr. 479; *La Fontaine v. Southern etc. Assn.*, 83 N. O. 132.

him, or that execution had not issued thereon and been returned, or that the judgment was not unsatisfied. Or while admitting the facts stated by plaintiff, the defendant may avoid them by producing a valid discharge in bankruptcy.<sup>158</sup>

**§ 404. The Examination.**—In many cases no one but the defendant is examined. The plaintiff is, however, entitled to compel the attendance of witnesses. He may, if he sees proper, confine his examination to the witnesses, and decline to question the defendant.<sup>159</sup> Sometimes the attendance of witnesses is secured by subpoena issued out of the court where the judgment was entered,<sup>160</sup> and sometimes by procuring and serving an order granted by the officer before whom the examination is conducted.<sup>161</sup> If a witness appears for examination, he may be compelled to answer all proper questions, whether he was regularly subpoenaed or not.<sup>162</sup>

Both the defendant and the witnesses must submit to a thorough and searching examination.<sup>163</sup> The plaintiff need not accept any general statement. He is entitled to the details.<sup>164</sup> The object of the proceeding is to discover whether the defendant has any assets.

<sup>158</sup> *Smith v. Paul*, 20 How. 97; *Coursen v. Dearborn*, 7 Robt. 143; *World Co. v. Brooks*, 7 Abb. Pr., N. S., 212.

<sup>159</sup> *Graves v. Lake*, 12 How. Pr. 33.

<sup>160</sup> *People v. Dutcher*, 3 Abb. Pr., N. S., 151; §§ 2441, 2442, Code N. Y.

<sup>161</sup> § 5479, Rev. Stats. Ohio; § 718, Code Civ. Proc. Cal.

<sup>162</sup> *People v. Marston*, 18 Abb. Pr. 257.

<sup>163</sup> *Sandford v. Carr*, 2 Abb. Pr. 462; *Forbes v. Willard*, 37 How. Pr. 193; 54 Barb. 520; *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493.

<sup>164</sup> *Brown v. Morgan*, 8 Edw. Ch. 278; *Steinhart v. Farrell*, 3 N. Y. St. Rep. 292.

subject to execution. All inquiries tending to promote this object and to assist in this discovery are permissible. If it is claimed that a question cannot be answered by a witness without criminating himself, the judge will determine whether it is likely to have that effect, and will compel or excuse the disclosure in accordance with such determination.<sup>165</sup> "The order and scope of the examination of a judgment debtor, in a proceeding supplemental to execution, are largely in the discretion of the judge or commissioner before whom such examination is being taken. This is necessarily so, because if the debtor has concealed property which is sought to be discovered, he is called to testify against his supposed interest, and will always give his testimony reluctantly. Unless a comprehensive and searching examination be allowed, an artful debtor might defeat the discovery sought. To apply to such an examination the strict technical rules governing the examination of a witness on the trial of a cause or even the less strict rules applicable to a cross-examination, which it more nearly resembles, would be to impair greatly the efficiency and usefulness of the remedy intended to be given by the proceeding, and in many cases to destroy it entirely. Hence, this court will not interfere and limit such an examination, unless it is made to appear very clearly that there has been an abuse of discretion by the examining officer in requiring the judgment debtor to answer improper interrogatories."<sup>166</sup> It is scarcely necessary to remark that in examinations in proceedings supplementary to execution, due notice must be taken of the law respecting privileged communications, and no question must be

<sup>165</sup> *Forbes v. Willard*, 37 How. Pr. 193, 54 Barb. 520.

<sup>166</sup> *Heilbronner v. Levy*, 64 Wis. 637; *State v. Barclay*, 86 Mo. 55.

required to be answered, nor any order be made, which will require the divulging of information which is protected as a privileged communication. Therefore, a physician will not be required to produce his books of account for inspection, if they contain, as part of his records, information derived from a patient which is of a privileged character.<sup>167</sup> Nearly all the statutes provide that no person shall be excused from answering, on the ground that his response may show him to have been guilty of fraud.<sup>168</sup> Any alleged transfer may be investigated, and the witnesses, whether interested in the transfer or not, may be compelled to disclose all facts within their knowledge tending to show its real nature and purposes.<sup>169</sup> The defendant is entitled to the assistance of his attorney, and to the privilege of a cross-examination.<sup>170</sup> In *Corning v. Tooker*, 5 How. Pr. 16, it was held that the defendant might correct his statement, but that he had no right to insist upon being cross-examined, and that a witness was not entitled to be represented and advised by counsel. The appearance by the defendant, and his

<sup>167</sup> *Kelly v. Levy*, 29 N. Y. St. R. 659, 8 N. Y. Supp. 849; *Mott v. Ice Co.*, 2 Abb. N. C. 143.

<sup>168</sup> § 5476, Rev. Stats. Ohio; § 505, Code Civ. Proc. Kan.; § 2460, Code N. Y.; § 312, Code Civ. Proc. S. C.; § 4075, Code Iowa; *Neally v. Ambrose*, 21 Pick. 185; *Lamb v. Stone*, 11 Pick. 527.

<sup>169</sup> *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493; *Clapp v. Lathrop*, 23 How. Pr. 423; *Sanford v. Carr*, 2 Abb. Pr. 462; *Williams v. Carroll*, 2 Hilt. 438. Contra, *Town v. Ins. Co.*, 4 Bosw. 683; *Van Wyck v. Bradly*, 3 Code R. 157; *Hunt v. Enoch*, 6 Abb. Pr. 212.

<sup>170</sup> *Le Roy v. Halsey*, 1 Duer, 589; 11 N. Y. Leg. Obs. 252; 1 Code R., N. S., 275. While it is probably true that a person under examination in supplemental proceedings, whether as a witness or as a party, is not entitled to be represented by counsel as a matter of right, or to have his aid or advice during the examination, yet, we think, the better course is to concede such right until it is attempted to be abused or extended beyond reasonable limits. *Schwab v. Cohen*, 13 N. Y. St. R. 709.



submitting to examination without objection, is a waiver of previous irregularities in the proceedings.<sup>171</sup>

**§ 405. The Order to be Made after the Examination.—**When it appears from the examination that the defendant has in his possession, or under his control, any money or property subject to execution, he may be ordered to apply such property to the satisfaction of the judgment.<sup>172</sup> The Revised Statutes of Missouri provide for proceedings against a judgment debtor by which he is compelled to appear and submit to examination respecting his ability and means of satisfying the judgment. Under this statute the power of the court is restricted to making an examination, and though the debtor discloses that he has property, on his person or otherwise in his possession, subject to execution, no order can be made that he deliver it to the sheriff or otherwise apply it to the satisfaction of the judgment,<sup>173</sup> but the statute of the state respecting garnishment declares that if it is made to appear to the court that any garnishee has executed to any defendant a negotiable promissory note which remains unpaid, the court, or a judge thereof, may order the defendant to deliver it up. Hence, if on an examination of the defendant, he discloses that he is in possession of any such instrument, the maker of it may be

<sup>171</sup> *Bingham v. Disbrow*, 14 Abb. Pr. 251; 37 Barb. 24; *Viburt v. Frost*, 3 Abb. Pr. 119; 5 Duer, 672; *Ammidon v. Wolcott*, 15 Abb. Pr. 314; *Underwood v. Sutcliffe*, 10 Hun, 453.

<sup>172</sup> *Baker v. State*, 109 Ind. 47; *Klepsch v. Donald*, 18 Wash. 150; § 3267, Rev. Stats. Nev.; § 317, S. C. Code Civ. Proc.; § 2447, N. Y. Code; § 719, Cal. Code Civ. Proc.; § 5483, Ohio Rev. Stats.; § 4077, Iowa Code. Where money is found in possession of the defendant, the court should order it to be paid to the creditor. *People v. King*, 9 How. Pr. 97.

<sup>173</sup> *State v. Barclay*, 86 Mo. 55; *In re Knaup*, 144 Mo. 653, 66 Am. St. Rep. 435.

summoned as garnishee, and thereupon an order may be made that the defendant deliver it to the proper officer, or to a receiver appointed by the court, and this order may be enforced by attachment against the body of the defendant.<sup>174</sup>

As an order for the application of money or other property by the defendant to the satisfaction of the writ may be enforced by imprisonment, it will not be made by any court having due regard for personal liberty, except in cases comparatively free from doubt. It must be clearly shown that the defendant has the property within his control; or, in other words, that he has the ability to obey the mandate of the court.<sup>175</sup> But the court will not be deterred from making the order by incredible accounts given by the defendant of his loss, or disposition of moneys or property shown to have recently been in his possession, if, from all the circumstances, it is satisfied that such accounts are false, and that the money or property is still within his control.<sup>176</sup>

It frequently appears, upon the examination of the defendant, or of some third person, that property exists, the title of which is in doubt. Supplemental proceedings are not well calculated for the litigation of conflicting claims of title, nor for the trial of disputed questions of fact. Where conflicting claims exist in good faith, the court will very rarely make an order requiring the delivery of the property.<sup>177</sup> This ques-

<sup>174</sup> *In re Knaup*, 144 Mo. 653, 66 Am. St. Rep. 435.

<sup>175</sup> *Sandford v. Moshler*, 13 How. Pr. 137; *Hall v. McMahon*, 10 Abb. Pr. 103; *Peters v. Kerr*, 22 How. Pr. 3; *Joyce v. Holbrook*, 2 Hilt. 94; 7 Abb. Pr. 338; *Welch v. P. Ft. W. & C. R. R.*, 1 West. L. M. 87; *Locke v. Mabbett*, 3 Abb. App. 68.

<sup>176</sup> *Logan v. O'Leary*, 43 N. J. Eq. 320.

<sup>177</sup> *People v. King*, 9 How. Pr. 97; *Stewart v. Foster*, 1 Hilt. 505; *Gaspar v. Bennett*, 12 How. Pr. 307; *Corning v. Tooker*, 5 How. Pr.

tion, however, is rarely presented on an examination of the defendant alone, but usually appears when a third person is called before the court and makes claim to money or property in his possession which the plaintiff insists belongs to the defendant, and should be applied to the satisfaction of the writ. It is not indispensable that the property, if personal, stand in the debtor's name. He may have kept his money on deposit in bank in the name of his wife, from whom he has a power of attorney authorizing him to draw checks on such deposit. If so, it is his duty to surrender such money or deposit to a receiver appointed in supplementary proceedings.<sup>178</sup> If the money or property is in the hands of the judgment debtor, the court or judge may make an order that he deliver it to the proper officer, leaving adverse claimants to litigate the question of title or right of possession with the officer. The order of the court can have no effect upon the title or right of possession of such third person, though he has been called before the court and examined as a witness.<sup>179</sup>

**§ 406. Proceeding to Reach Known Assets in the Hands of Defendant.**—The proceeding of which we have just treated is prosecuted upon the theory that the plaintiff does not know of any property subject to exe-

16; *Rodman v. Henry*, 17 N. Y. 484; *Teller v. Randall*, 26 How. Pr. 155; *Crounse v. Whipple*, 34 How. Pr. 333; *Clapp v. Lathrop*, 23 How. Pr. 423; *Locke v. Mabbett*, 3 Abb. App. 68; *Alexander v. Richardson*, 7 Robt. 63; *West Side Bank v. Pugsley*, 47 N. Y. 368; 12 Abb. Pr., N. S., 28; *Barnard v. Kobbe*, 8 Daly, 373. But where the property clearly belongs to the debtor, and is under his control, the judge should direct him to apply it to the satisfaction of the judgment, instead of appointing a receiver. *Rodman v. Henry*, 17 N. Y. 482; *Goodyear v. Betts*, 7 How. Pr. 187.

<sup>178</sup> *Weld v. Sage*, 54 N. Y. Supp. 253.

<sup>179</sup> *Osborne v. Reardon*, 79 Ia. 175.

cution, and is, therefore, anxious to ascertain, by an examination of the defendant and others, whether any such property can be found. The proceeding of which we are about to speak is based upon the assumption that the plaintiff does know of property subject to the writ, and that such property is within the control of the defendant, and is by him unjustly withheld from the execution. In this proceeding, the plaintiff is entitled to compel the appearance and examination of the defendant; or in case it appears that the defendant is about to abscond, an order of arrest may be granted.<sup>180</sup> After the arrest, the defendant may be required to give security that he will, from time to time, attend before the judge or referee, and that he will not dispose of any of his property subject to execution. To authorize an order of examination or arrest, the execution must have been issued, but it need not have been returned. The requisite facts must generally be shown by affidavit. The affidavit differs in two essential particulars from that under consideration in section 400; viz., it need not show that the execution has been returned, and it must state that the defendant has property subject to execution which he unjustly refuses to apply to the satisfaction of the writ. The defendant cannot be required to appear and answer in the absence of this averment.<sup>181</sup> In Indiana, the statute also requires the affidavit to state that the judgment debtor resides in the county in which it is filed, and that an execution has been issued to the county in which he resides, or if he is a nonresident of

<sup>180</sup> Ohio Rev. Stats., §§ 5473, 5474; S. C. Code Civ. Proc., § 812; Code of Iowa, §§ 4073, 4085; Cal. Code Civ. Proc., § 715; Wis. Ann. Stat., § 3032; N. Y. Code, § 2437.

<sup>181</sup> Dillman v. Dillman, 90 Ind. 585; Mitchell v. Bray, 106 Ind. 264.

the state, that an execution has been issued to the sheriff of the county in which the judgment was entered.<sup>182</sup> Some necessity for the proceeding should be shown, and a description should be given of the property unjustly withheld from execution by the defendant.<sup>183</sup> In New York, in cases of this class, great strictness of proceeding is exacted. If the affidavit is upon information and belief, the name of the informant and his means of knowledge must be disclosed.<sup>184</sup> An affidavit following the language of the statute is sufficient to call into action the jurisdiction of the court; but if objected to, it will be regarded as irregular, and a description will be exacted of the property withheld, and the facts and circumstances must be disclosed with sufficient detail to enable the judge to determine for himself whether the defendant "has property which he unjustly refuses to apply to the writ."<sup>185</sup> A demand on the debtor that the property be applied on the writ must be shown; for in the absence of such demand, he has not unjustly refused to apply it.<sup>186</sup> In North Carolina, the affidavit must state that the judgment debtor has no property which can be reached by the execution, or if he has any of such property, that it is not sufficient to satisfy the writ; and that he has property, choses in action, or things of value, which he unjustly refuses to apply to the payment of the judgment; but no personal demand that the debtor so apply

<sup>182</sup> *Pouder v. Tate*, 111 Ind. 148; *Fowler v. Griffin*, 83 Ind. 297.

<sup>183</sup> *Cushman v. Gephart*, 97 Ind. 46; *Dandistel v. Kronenberger*, 89 Ind. 405.

<sup>184</sup> *Manken v. Pape*, 65 How. Pr. 453.

<sup>185</sup> *First Nat. Bank v. Wilson*, 13 Hun, 232; *Manken v. Pape*, 65 How. Pr. 453.

<sup>186</sup> *Hall v. Kellogg*, 12 N. Y. 331; *Levy v. Beacham*, 64 Hun, 62, 18 N. Y. Supp. 629; *First N. B. v. Wilson*, 13 Hun, 232; *Bowery Bank v. Widmayer*, 9 N. Y. Supp. 629.

this property need be averred.<sup>187</sup> It is not necessary in this state to describe the property which the debtor has in his possession and which he refuses to apply to the execution.<sup>188</sup> The service of the order, the appearance of the parties, and the method and extent of the examination, do not vary materially from corresponding proceedings, where the debtor is summoned for the purposes of discovery only, with this exception, that in this proceeding the inquiry is confined to the investigation of the question whether the defendant did have, and did unjustly refuse to apply to the satisfaction of the judgment, the property described in the affidavit.

§ 406 a. **Second Examination of Judgment Debtor.**—None of the various statutes upon the subject contain any language imposing any limitation upon the number of times in which a debtor may be examined. The courts in New York have, however, imposed such limitation. They will not permit a debtor to be harassed by successive examinations without cause.<sup>189</sup> If he has been once examined, and a second examination is desired, the affidavit should disclose the previous examination, and some reason why another examination should be had,<sup>190</sup> such as that the debtor had subsequently acquired property, or that new facts have come to the knowledge of the applicant.<sup>191</sup>

<sup>187</sup> *Hutchison v. Symons*, 67 N. C. 156; *Hinsdale v. Sinclair*, 83 N. C. 338; *Wieller v. Lawrence*, 81 N. C. 65. A demand need not be stated in Ohio. *Edgerton v. Hanna*, 11 Ohio St. 323.

<sup>188</sup> *Bank v. Burns*, 109 N. C. 105.

<sup>189</sup> *Irwin v. Chambers*, 40 N. Y. Sup. Ct. 432; *Canavan v. McAndrew*, 20 Hun, 46; *Clarke v. Londrigan*, 40 N. J. L. 810; *Marshall v. Link*, 59 Hun, 618; *Losee v. Allen*, 40 N. Y. Supp. 849.

<sup>190</sup> *Grocers' Bank v. Bayaud*, 21 Hun, 203; *Goodall v. Demarest*, 2 Hilt. 534.

<sup>191</sup> *Carter v. Clarke*, 7 Robt. 43; *Jurgenson v. Hamilton*, 5 Abb. N. C. 149.

## PROCEEDINGS AGAINST THIRD PERSONS.

**§ 407. This Proceeding is Independent of the Others.—** The third proceeding supplemental to execution is that by which the plaintiff is entitled to an order requiring the appearance before the judge of any person or corporation alleged to have possession of the property of the judgment debtor, or to be indebted to him.<sup>192</sup> It was for some time insisted that this proceeding could only be invoked in connection with the proceeding authorizing the summoning of the defendant for the purpose of ascertaining whether he had any assets subject to execution,<sup>193</sup> and, therefore, that where this last remedy could not be pursued, the plaintiff must have recourse to a creditor's bill.<sup>194</sup> It was next contended that third persons ought not to be summoned to appear, except where proceedings had already been taken to compel the defendant to appear and answer, unless in cases where the law did not authorize the taking of such proceedings against the defendant.<sup>195</sup> It is now conceded that these two proceedings are not dependent on each other. The defendant may be summoned to appear, without taking any proceeding against his debtor, and his debtors, or persons having his property under their control, may be brought before the court without first requiring the defendant to appear and

<sup>192</sup> N. Y. Code Civ. Proc., § 2441; Cal. Code Civ. Proc., § 717; Ohio Rev. Stats., § 5475; S. C. Code Civ. Proc., § 314; Rev. Stats. Nev., § 3265; Stats. of Wis., § 3029; Code Iowa, § 4087.

<sup>193</sup> *Kemp v. Harding*, 4 How. Pr. 178; *Sherwood v. B. & N. Y. R. R.*, 12 How. Pr. 136.

<sup>194</sup> *Barker v. Johnson*, 4 Abb. Pr. 435.

<sup>195</sup> *Holmes v. Jordan*, 15 Abb. Pr. 410, note; *Parker v. Hunt*, 15 Abb. Pr. 410; *Ward v. Beebe*, 15 Abb. Pr. 372; *McBride v. F. & M. Bank*, 7 Abb. Pr. 347.

answer.<sup>196</sup> Though this proceeding is against third persons, it is, to the same extent as proceedings against the defendant alone, a proceeding in the original action, and not a new suit or action.<sup>197</sup>

**§ 408. Order of Examination, how Procured, and Facts Necessary to Support.**—To warrant an order of examination under this proceeding, it must be shown by affidavit, or other competent written evidence, to the satisfaction of the judge that an execution against property has been issued, and either that it has been returned wholly or partly unsatisfied, or that it has not been returned, and also that some person or corporation has possession of personal property of the judgment debtor, or is indebted to him.<sup>198</sup> The issuing of the execution is, therefore, the first step toward sustaining the proceeding, and if it has not issued, or has issued when not authorized, the proceeding cannot be maintained.<sup>199</sup> The writ in New York might formerly have issued to the county where the person summoned resided, or where the property sought to be reached was situated, instead of to the county of the defendant's residence.<sup>200</sup> The code of that state now provides that whether the proceeding be against the defendant or against a third person, an execution must issue to the sheriff of the county where the judgment debtor has, at the time of the commencement of the proceeding,

<sup>196</sup> *Gibson v. Haggerty*, 37 N. Y. 555, 97 Am. Dec. 752; 5 Trans. App. 143; 15 Abb. Pr. 406; 23 How. Pr. 260; *Hexter v. Clifford*, 5 Col. 168.

<sup>197</sup> *High v. Bank of Commerce*, 95 Cal. 386, 29 Am. St. Rep. 121.

<sup>198</sup> *Seeley v. Garrison*, 10 Abb. Pr. 460; *Gibson v. Haggerty*, 37 N. Y. 555, 5 Trans. App. 143, 97 Am. Dec. 752.

<sup>199</sup> *Allen v. Stallcup*, 13 Wash. 631.

<sup>200</sup> *Courtois v. Harrison*, 12 How. Pr. 359; 3 Abb. Pr. 96; 1 Hilt. 109; *People v. Norton*, 4 Sand. 640.



a place for the regular transaction of business in person, or, where he is a resident of the state, to the sheriff of the county where he resides, or, if he is not a resident of the state, to the sheriff of the county where the judgment roll was filed, unless the execution was issued out of a court other than that in which the judgment was rendered, and in that case to the sheriff of the county where the transcript of the judgment is filed.<sup>201</sup> Unless it appears that a writ has issued as thus prescribed, the judge has been said to be without jurisdiction to proceed, and, therefore, not authorized to make any order against a third person, though he has attended in response to an order and submitted to an examination.<sup>202</sup>

With respect to the mode in which facts necessary to sustain the proceeding shall be disclosed to the judge, we have already shown what the language of the statute is, and, as some of these facts cannot appear by the records or papers in the case, it is manifest that they must be brought to the attention of the court by affidavit. The facts so referred to relate to the residence of the judgment debtor and to the claim that some person or corporation owes him or has his property in his or its possession. Hence, in all cases an affidavit on behalf of the plaintiff is indispensable.<sup>203</sup> It has been held that it may be made on information and belief without disclosing the source of the information.<sup>204</sup> It is probably true that an order based upon such an affidavit is not void, and, hence, cannot be disregarded while it remains in force, but it must be deemed

<sup>201</sup> Code Civ. Proc. N. Y., § 2458.

<sup>202</sup> *Schenck v. Irwin*, 15 N. Y. Supp. 55.

<sup>203</sup> *Mason v. Weston*, 29 Ind. 561.

<sup>204</sup> *Grinnell v. Sherman*, 11 N. Y. Supp. 682.

insufficient if challenged in any appropriate manner", as, for instance, by a motion to vacate the order and to proceed no farther against the party cited to appear.<sup>205</sup> In Texas it has been held that the affidavit may be in the alternative; or, in other words, that it may state that the person named has property of the defendant, or is indebted to him.<sup>206</sup> In that state it must show that none of the defendants has sufficient property in his possession, within the jurisdiction of the court, to satisfy the judgment.<sup>207</sup> We can find nothing in the statutes of most of the states warranting this requirement, or exhibiting any design, on the part of the legislature, to compel the plaintiff to exhaust his remedy against one defendant before pursuing another. The statutes do not usually authorize the summoning of every debtor, however insignificant the debt may be. They specify a sum; and the affidavit must state that the indebtedness is equal to or in excess of that sum. If the person whose examination is sought is alleged to have property of the judgment debtor, the value of the property need not be stated.<sup>208</sup>

**§ 409. The Principal Debtor must be Summoned, and not his Agents.**—All proceedings supplemental to execution have, or may have, two purposes. The first of these is to obtain information concerning property liable to contribute to the satisfaction of the judgment; and the second is to prevent such property from being so disposed of, after the institution of the proceedings,

<sup>205</sup> *Fleming v. Tourgee*, 16 N. Y. Supp. 2; *Bruen v. Nickles*, 51 N. Y. Supp. 352; *Matter of Leslie*, 44 N. Y. Supp. 1108; *Matter of Parrish*, 50 N. Y. Supp. 735, 28 App. Div. 22.

<sup>206</sup> *White v. Lynch*, 26 Tex. 195. Contra, *Lee v. Heirberger*, 1 Code R. 38; *Davis v. Herrig*, 65 How. Pr. 290.

<sup>207</sup> *Willis v. Lyman*, 22 Tex. 268.

<sup>208</sup> *Brett v. Browne*, 1 Abb. Pr., N. S., 155; *Miller v. Adams*, 52 N. Y. 409.

as to be carried beyond the reach of the plaintiff.<sup>209</sup> In order to accomplish this last purpose, it is essential, in proceedings against third persons, to summon the defendant's real debtor, instead of proceeding against some mere agent or employé. An agent, clerk, treasurer, or other employé often appears to be in possession of property. He may be intrusted with the keys of a safe or store, and have a more visible control over it than his employer has. In contemplation of law, the latter is, nevertheless, in possession, and exercising control. If he has property belonging to the defendant, he, and he only, need be restrained from disposing of the property, and summoned to answer concerning its ownership. An agent, clerk, or treasurer cannot be charged as garnishee or trustee on account of property of which he holds the possession for his employer, and which the employer holds for the use, or as the bailee, of the defendant.<sup>210</sup> Where a corporation is to be garnished or summoned to appear, the notice must

<sup>209</sup> The statutes do not directly state that the summoning of a third person to answer creates any lien on the property in his hands, or imposes on him any obligation to retain possession of such property, to be disposed of as may seem proper to the court after the examination has been made. Neither is there anything in the statutes directly authorizing the court to issue any restraining order previous to the examination. The courts, from necessity, have supplied the remarkable deficiencies of the law. They have assumed that the service of the notice to appear ought not to be permitted to act as a mere invitation for the debtor to dispose of the property, or to pay it over to the defendant before the examination could take place. Hence it has always been understood that from the service of the notice to appear, the summoned debtor became liable to account to the plaintiff for the debts due from him to the defendant; and that the court might also, in direct terms inserted in the order to appear, restrain the person to be examined from making any disposition of the property calculated to render the proceeding fruitless. *Seeley v. Garrison*, 10 Abb. Pr. 460; *De Comeau v. The People*, 7 Robt. 498; *Union Bank v. Union Bank*, 6 Ohio St. 254. See, also, *Malley v. Altman*, 14 Wis. 22; *Almy v. Platt*, 16 Wis. 169.

<sup>210</sup> *McGraw v. M. O. R. R. Co.*, 5 Cold. 434.

be directed to the corporation, and not to one of its agents or employés. It must also be served on the proper officer.<sup>211</sup>

**§ 410. Over Whom the Judge may Take Jurisdiction.—**As the plaintiff in these proceedings is but seeking to assert rights which otherwise could be asserted by the defendant, it would seem to be just and logical to assume that the former can pursue all persons and corporations liable to pursuit by the latter, and capable of being brought within the jurisdiction of the court in which the proceedings are instituted.<sup>212</sup> Hence, an infant, if liable to the defendant, may be charged as a trustee or garnishee, and the benefit of his liability thereby transferred from the defendant to the plaintiff.<sup>213</sup> Executors and administrators may also be required to answer respecting funds in their custody to which the judgment debtor is entitled, or in which he has an interest as heir, legatee, or otherwise.<sup>213a</sup>

The only questions which deserve any special consideration in this section are: 1. Concerning the liability of nonresident persons; and 2. Concerning the liability of corporations, whether domestic or foreign. It is well known that no state can extend its process so as to affect persons or property beyond its territorial

<sup>211</sup> *Clark v. Chapman*, 45 Ga. 486. Service on the teller of a bank (*Kennedy v. H. S. & L. S.*, 38 Cal. 151), or the treasurer or cashier of a corporation (*Sprague v. S. N. Co.*, 52 Me. 592), is insufficient. Under most statutes, this officer must be either the president, secretary, or managing agent. If a safe is rented of a safe-deposit company, its contents are deemed to be in possession of the lessee, and cannot be reached by a garnishment served on the company. *Gregg v. Hilson*, 8 Phila. 91.

<sup>212</sup> *Drake on Attachment*, § 468.

<sup>213</sup> *Scofield v. White*, 29 Vt. 330; *Wilder v. Eldridge*, 17 Vt. 226. Against married women. *Thompson v. Sargent*, 15 Abb. Pr. 452.

<sup>213a</sup> *Murphy v. Busick*, 22 Ind. App. 247, 72 Am. St. Rep. 000; *Spencer v. Greene*, 17 R. I. 727; *Laurence v. Pease*, 21 N. Y. Supp. 223.

limits,<sup>214</sup> but that persons resident of one state, may, by voluntarily going into another, subject themselves to the laws and tribunals of the latter.<sup>215</sup> The proper application of these two principles ought to be of material aid in determining when, and in what circumstances, a nonresident can be summoned and charged as garnishee. If the person sought to be garnished resides in another state, but has property of the defendant in the state where the writ issues, or owes the defendant a debt payable there, he may, when he comes within the latter state, though but for a temporary purpose, be summoned and charged as a garnishee.<sup>216</sup> In all other cases, no one can be held as garnishee unless he resides within the jurisdiction of the court by which he is summoned.<sup>217</sup>

In Massachusetts, it was, at an early day, decided that a corporation aggregate could not be subjected to trustee process.<sup>218</sup> In New York, such corporations have been held to be exempt from proceedings supplemental to execution, whether they be sought to be pursued as judgment debtors, or as owing such

<sup>214</sup> Freeman on Judgments, § 564.

<sup>215</sup> Ibid., § 566.

<sup>216</sup> Drake on Attachment, § 474; Young v. Ross, 11 Fost. 201; Jones v. Winchester, 6 N. H. 497. A resident of the state may be summoned as a trustee when he holds the property of a nonresident debtor. King v. Holmes, 7 Fost. 266; Eaton v. Badger, 33 N. H. 228.

<sup>217</sup> Tamm v. Williams, 2 Chitty, 438; 3 Doug. 281; Crosby v. Hetherington, 4 Man. & G. 933; Day v. Paupierre, 7 Dan. & L. 12; 13 Ad. & E., N. S., 802; Green v. F. & C. Bank, 25 Conn. 452; Tingley v. Bateman, 10 Mass. 343; Ray v. Underwood, 3 Pick. 302; Hart v. Anthony, 15 Pick. 445; Nye v. Liscombe, 21 Pick. 263; Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 630; Columbus I. Co. v. Eaton, 35 Me. 391; Sawyer v. Thompson, 4 Fost. 510; Baxter v. Vincent, 6 Vt. 614; Bates v. N. O. R. R. Co., 4 Abb. Pr. 72; Willett v. Equitable Ins. Co., 10 Abb. Pr. 193; Miller v. Hooe, 2 Oranch C. C. 622; Drake on Attachment, §§ 473, 474.

<sup>218</sup> Union Turnpike v. Jenkins, 2 Mass. 37.

debtors.<sup>219</sup> But in a vast majority of the states domestic corporations are subject to proceedings supplemental to execution, and also to garnishment, although the statute does not, in direct terms, make them liable. They may be summoned and charged as "persons."<sup>220</sup> Corporations chartered by two or more states may in each be treated as domestic.<sup>221</sup> On the other hand, corporations chartered by or under the laws of one state are elsewhere regarded as foreign. In some states, it seems that a foreign corporation can, under no circumstances, be held as a garnishee.<sup>222</sup> But the better supported rule is, that when such corporations carry on a regular business, and have agents and managers in a particular state, they so far submit themselves to the jurisdiction of such state that they can there be garnished.<sup>223</sup>

<sup>219</sup> *Hinds v. C. N. F. R. R. Co.*, 10 How. Pr. 487; *Sherwood v. B. & N. Y. R. R. Co.*, 12 How. Pr. 136; *Hammond v. H. R. I. & M. Co.*, 11 How. Pr. 29; 20 Barb. 378; *Carter v. Clarke*, 7 Robt. 490. But in other cases corporations have been held liable to be summoned to answer whether they owe defendant or have property of his in their hands. *Lowber v. Mayor of N. Y.*, 5 Abb. Pr. 268; *McBride v. Farmers' Branch Bank*, 7 Abb. Pr. 347.

<sup>220</sup> *Baltimore and Ohio R. R. v. Gallahue*, 12 Gratt. 655, 65 Am. Dec. 254; *St. Louis P. Ins. Co. v. Cohen*, 9 Mo. 421; *Burton v. District Township*, 11 Iowa, 166; *Wales v. Muscatine*, 4 Iowa, 302; *Knox v. Protection Ins. Co.*, 9 Conn. 430, 25 Am. Dec. 33; *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646; *Taylor v. B. & M. R. R. Co.*, 5 Iowa, 114; *Toledo Railway Co. v. Howes*, 68 Ind. 458; *Hughes v. Oregonian R. R. Co.*, 11 Or. 158; *Knight v. Nash*, 22 Minn. 452; *La Fountain v. Southern Underwriters*, 79 N. O. 514; *Chesapeake R. R. v. Paine*, 29 Gratt. 508; *Buffham v. Racine*, 26 Wis. 460. A corporation may be summoned to appear as a judgment debtor. *Tompkins v. Floyd Co.*, 19 Ind. 197.

<sup>221</sup> *Baltimore & Ohio R. R. Co. v. Gallahue*, 12 Gratt. 655, 65 Am. Dec. 254; *Smith v. B. C. & M. R. R.*, 33 N. H. 337.

<sup>222</sup> *Danforth v. Penny*, 3 Met. 564; *Gold v. Housatonic R. R. Co.*, 1 Gray, 424; *Bradford v. Mills*, 5 R. I. 393; *Smith v. B. C. & M. R. R.*, 33 N. H. 337.

<sup>223</sup> *United States Bank v. Merchants' Bank*, 1 Rob. (Va.) 605; *McAllister v. Penn. Ins. Co.*, 28 Mo. 214; *Selma R. & D. R. R. Co.*

The object of these proceedings is to discover whether any person or corporation has property of the defendant subject to execution. To accomplish this object, a full and liberal examination will be permitted, and all persons whose knowledge is likely to assist in the discovery may be questioned.<sup>224</sup> Hence the defendant's wife may be summoned, and required to state whether she has property of the defendant in her possession, or under her control.<sup>225</sup>

§ 411. To Whom Notice must be Given.—The judicial proceedings of every civilized country will not permit the condemnation of any person without first giving him some notice to appear, and some opportunity to make his defense. Therefore, when it is sought to make any person liable for property in his hands, which it is alleged belongs to the defendant, the former must first be summoned and examined before an order can be made requiring him to surrender possession of the property.<sup>226</sup> Where proceedings are instituted for the purpose of reaching property in the hands of a third person, while there is no doubt that such person must be brought before the court, there is some differ-

v. Tyson, 48 Ga. 352; Brauser v. N. E. F. Ins. Co., 21 Wis. 506; Jones v. N. Y. & E. R. R. Co., 1 Grant Cas. 457; Fithian v. N. Y. & E. R. R. Co., 31 Pa. St. 114; First N. B. v. Burch, 80 Mich. 242.

<sup>224</sup> Clapp v. Lathrop, 40 N. Y. 328; 23 How. Pr. 423; Gibson v. Haggerty, 37 N. Y. 555, 97 Am. Dec. 752; 5 Trans. App. 143; Curtois v. Harrison, 3 Abb. Pr. 96; 12 How. Pr. 359; Lowber v. Mayor of N. Y., 7 Abb. Pr. 248.

<sup>225</sup> Lockwood v. Worstell, 15 Abb. Pr. 430, note; Mary J. O'Brien's Case, 24 Wis. 547. Contra, Macondray v. Wardle, and Andrews v. Nelson, 7 Abb. Pr. 3. See Claremont Bank v. Clark, 46 N. H. 134.

<sup>226</sup> Hathaway v. Brady, 26 Cal. 581; Cockfield v. Tourres, 24 La. Ann. 168. To impart validity to proceedings against a garnishee, it must be shown that the summons or notice to appear was served on him as required by law. Mitchell v. Greenwald, 43 Miss. 167; Jefferies v. Harvie, 38 Miss. 97; Roy v. Heard, 38 Miss. 544; Moore v. Coats, 43 Miss. 225. He cannot be enjoined from disposing of prop-

ence of opinion whether the defendant in execution should be joined with him. In Indiana, it is well settled that proceedings supplemental to execution cannot be prosecuted against a third person without also notifying the defendant of such proceedings, and making him a party thereto.<sup>227</sup> In New Jersey, it is said that an order of discovery in aid of execution and an examination of witnesses made without personal notice to the defendant are irregular, and that the proceedings will be vacated.<sup>228</sup> But the better opinion is, that it is within the discretion of the court whether the defendant shall or shall not be notified of proceedings to reach property, or to collect debts claimed to be due to him from some third person; and that, in ordinary cases, a defendant is not of right entitled to any notice of such proceedings, nor is he a party thereto in such a sense as entitles him to interfere therewith, or to conduct the defense of the person summoned.<sup>229</sup> If, however the appointment of a receiver is sought, it is said that the defendant must be made a party, and given notice of the hearing of the application.<sup>230</sup>

§ 412. The Effect of the Notice.—There can be no doubt that the service of a garnishment, or of a notice to appear, issued in proceedings supplemental erty until after he has had notice to appear. *King v. Tuska*, 1 Duer, 635.

<sup>227</sup> *Chandler v. Caldwell*, 17 Ind. 256; *Wall v. Whisler*, 14 Ind. 228; *O'Brien v. Flanders*, 41 Ind. 486; *Folsom v. Clark*, 48 Ind. 414.

<sup>228</sup> *Shannon v. McMurtrie*, 48 N. J. L. 427.

<sup>229</sup> *Foster v. Prince*, 18 How. Pr. 258; 8 Abb. Pr. 407; *De Comeau v. The People*, 7 Robt. 498; *Corning v. Tooker*, 5 How. Pr. 16; *Gibson v. Haggerty*, 37 N. Y. 555, 97 Am. Dec. 752; 5 Trans. App. 143; *Lynch v. Johnson*, 48 N. Y. 27; 46 Barb. 56; *Ward v. Beebe*, 17 Abb. Pr. 1; *Seeley v. Garrison*, 10 Abb. Pr. 460; *Adams v. Hackett*, 7 Cal. 187; N. Y. Code Civ. Proc., § 2441.

<sup>230</sup> *Kemp v. Harding*, 4 How. Pr. 178; *Andrews v. Glenville Woolen Co.*, 11 Abb. Pr., N. S., 78; *Sayles v. Best*, 20 N. Y. Supp. 951; *Grace v. Curtiss*, 32 N. Y. Supp. 321.



to execution, fixes the liability of the person upon whom service was made, and makes him accountable to the plaintiff for all property in his hands, and for all debts due from him to the defendant at the time of such service.<sup>231</sup> There are cases which indicate that a lien is also established upon the specific property in the hands of the garnishee.<sup>232</sup> But upon this subject the authorities are, no doubt, conflicting, and are yet in too crude a state to warrant us in expressing any positive opinion as to the position which will be ultimately established.<sup>233</sup> The effect of a garnishment is

<sup>231</sup> *Bethel v. Chipman*, 57 Mich. 379; *Card v. Ahearne*, 18 R. I. 765; *Ege v. Koontz*, 3 Pa. St. 109; *Ober v. Matthews*, 24 La. Ann. 90; *Brashear v. West*, 7 Pet. 623; *McBride v. Floyd*, 2 Bail. 209; *Johnson v. Carry*, 2 Cal. 33; *Ryan v. Burkam*, 42 Ind. 507; *Board of Education v. Scoville*, 13 Kan. 29.

<sup>232</sup> *Rennecker v. Davis*, 10 Rich. Eq. 289; *Burlingame v. Bell*, 16 Mass. 318; *Dore v. Dawson*, 6 Ala. 712; *Blaisdill v. Ladd*, 14 N. H. 129. In the following cases the statement is made, in general terms, that a lien is created by the service of the notice to appear: *Oooke v. Ross*, 22 Ind. 157; *Porter v. Williams*, 5 How. Pr. 441; *Union Bank v. Union Bank*, 6 Ohio St. 254; *Butler v. Jaffray*, 12 Ind. 504; *Graydon v. Barlow*, 15 Ind. 197; *Miers v. Z. & M. T. Co.*, 13 Ohio, 197; *Lynch v. Johnson*, 48 N. Y. 27; *Wilder v. Weatherhead*, 82 Vt. 765; *State v. Linaweaver*, 3 Head, 51; *Warfield v. Campbell*, 38 Ala. 527, 82 Am. Dec. 724; *Kellogg v. Collier*, 47 Wis. 649; *Cottrell v. Varnum*, 3 Ala. 229, 39 Am. Dec. 323. The present Code of Civil Procedure of New York (section 2469) in effect creates a lien in favor of the receiver, by declaring that his title to personal estate shall vest by relation to the time when the order was served on the judgment debtor to appear and answer, or upon the garnishee, when proceedings are against third persons. "But this section does not affect the title of a purchaser in good faith, without notice and for a valuable consideration, or the payment of a debt in good faith, and without notice." *Duffy v. Dawson*, 21 N. Y. Supp. 978; *Re Zimmer*, 8 App. Div. 556.

<sup>233</sup> If a stranger to the execution has in his hands property of the defendant, capable of manual delivery, and liable to be seized and sold under the writ, certainly it will be safer to make a direct levy on such property than to summon the bailee thereof as garnishee. For upon such property, it is clear that in many of the states the garnishment creates no specific lien, and does not prevent priority

thus stated in section 453 of Drake on Attachment: "The defendant's rights in the property are so far extinguished as to prevent his making any disposition of it which would interfere with its subjection to the payment of the plaintiff's demand, when that shall have been legally perfected; but for every purpose of making any demand which may be necessary to fix the garnishee's liability to him, or of securing it by legal proceedings, or otherwise, his rights remain unimpaired by the pending garnishment, but, of course, can be exercised only in subordination to the lien thereby created." <sup>234</sup>

The effect of a garnishment or of a proceeding supplementary to execution directed against a third person, may be considered, first, when, after the garnishment or the service of the notice to appear, the person on whom it is served pays the debt or parts with the possession of the property sought to be garnished, and he is, nevertheless, sought to be held liable therefor; second, when, under similar circumstances, proceedings are taken to reach property or its proceeds in the hands of a third person not a party to the action or proceeding; and, third, when others are proceeding against the property of the person garnished, and are met with the claim that the proceeding taken supplementary to execution or by garnishment has created a general lien against the property of the person summoned to appear, which cannot be supplanted or rendered inoperative by other proceedings by or against him, though

being conceded to a direct levy made at a subsequent period. *Johnson v. Gorham*, 6 Cal. 195, 65 Am. Dec. 501; *Walcott v. Keith*, 2 Fost. 196; *Moore v. Holt*, 10 Gratt. 284; *Bigelow v. Andress*, 81 Ill. 322; *Voorhees v. Seymour*, 26 Barb. 569; *Becker v. Torrance*, 81 N. Y. 631.

<sup>234</sup> *Hicks v. Gleason*, 20 Vt. 139.

in other suits. In a case of the first class, namely, one arising between the person summoned and the plaintiff in the writ, there is no doubt, as we have shown, that the service of the motion to appear creates a liability against the person on whom it is served and imposes upon him an obligation in favor of the plaintiff to pay him the debt sought to be reached, or to turn over, for the satisfaction of the writ, the property in the custody of the garnishee belonging to the judgment debtor and liable to be taken in execution against him. The right thus created in favor of the plaintiff is not, in our judgment, a lien, but rather a mere personal obligation, for the failure to respect which an appropriate action may be sustained by the judgment creditor for the damages suffered by him.

When a person having property of the judgment debtor in his possession, or owing him a debt, is garnished or ordered to appear and answer in supplemental proceedings, and is hence made liable to the judgment creditor, the former, as we think, has a right to retain such property in his possession and to refuse to pay such debt until his liability is determined, and, therefore, no officer should be permitted to afterward levy upon such property, nor should any transfer subsequently made by the judgment debtor be enforceable against the garnishee.<sup>235</sup> Aside from this right to retain the property or postpone the payment of the debt until the liability of the person sued is determined, it is doubtful whether any lien is created against it, and, therefore, except in so far as his rights may be involved, it seems to be subject to subsequent levies and transfers, and, therefore, the safer mode of proceeding

<sup>235</sup> Reed v. Fletcher, 24 Neb. 435, 8 Am. St. Rep. 224; Walcott v. Keith, 2 Fost. 196.

on the part of the judgment creditor is to levy upon property capable of manual delivery and take it into the possession of the levying officer, instead of relying upon a notice served on the person in whose possession it is.<sup>236</sup> So, when instead of having property capable of manual delivery in his possession, the garnishee owes the judgment debtor, the service of the notice appears not to create any lien upon such debt as between the judgment creditor and a third person, who may subsequently, without receiving them from the garnishee, come into possession of the proceeds of the debt. A. E. H. was garnished on account of a judgment under which he was liable to W. H. C. This judgment was subsequently assigned to A. C., who, in turn, assigned to S., receiving a sum of money in excess of the amount for which the garnishment was made. Instead of proceeding against A. E. H. to enforce any liability which might exist against him because of his garnishment, another execution was caused to be issued on the judgment, and A. C. was cited to appear in supplementary proceedings, on the theory that, in assigning the judgment which was sought to be garnished and receiving payment therefor, he had made himself liable in place of A. E. H. In holding that this action could not be sustained, the court said: "However it may be with specific property in the hands of the garnishee, our conclusion is that garnishment does not give the creditor any lien upon a debt owing by the garnishee to the debtor in the action, nor upon any money or property with which he may afterward pay

<sup>236</sup> Johnson v. Gorham, 6 Cal. 195, 65 Am. Dec. 501; Bigelow v. Andress, 31 Ill. 322; Mooar v. Walker, 46 Ia. 164; McConnell v. Denham, 72 Ia. 494; McGarry v. Lewis C. Co., 93 Mo. 237, 3 Am. St. Rep. 522; Walcott v. Keith, 2 Fost. 196.

it. The books speak of it as giving a 'quasi lien' —such a lien as will justify the garnishee in refusing to pay his creditor until the garnishment is disposed of, and as will give the creditor a right of action against the garnishee for any money or property in his hands owing or belonging to the party against whom the writ runs (Wade on Attachment, § 329), but not such a lien as will enable the creditor to follow any money that may be paid thereon into the hands of third persons." <sup>237</sup>

On the other hand, it has been held that where the debt garnished is not capable of manual delivery, the service of the notice to appear operates as a conditional transfer of the debt to the judgment debtor, and takes precedence over all subsequent transfers.<sup>238</sup> In Texas and Wisconsin, where personal property had been conveyed, as it was alleged in fraud of creditors, a garnishment or notice to appear in supplementary proceedings served on the fraudulent transferee was held to create a lien or right in favor of the judgment creditor, which could not be supplanted by any proceeding of a subsequent date, and it was affirmed in general terms that by this service a lien was created against the property sought to be affected thereby.<sup>239</sup>

In Montana, a garnishment was served upon a person indebted to the judgment debtor. Afterward, other proceedings were commenced against the garnishee, in which it was sought to attach his property, and the question was presented, whether the service of the garnishment on him had created a general lien or liability which so far affected his property that it could

<sup>237</sup> *Hulley v. Chedle*, 22 Nev. 127, 58 Am. St. Rep. 729.

<sup>238</sup> *Sessions v. Stevens*, 1 Fla. 233, 46 Am. Dec. 339.

<sup>239</sup> *Focke v. Blum*, 82 Tex. 436; *Dahlman v. Greenwood*, 99 Wis. 163.

not be reached and applied to the satisfaction of other creditors under attachments issued in their behalf. Though the point was not involved, the court affirmed that, with respect to chattels capable of manual delivery in the possession of a garnishee, an inchoate lien or right was acquired by the garnishment as to such chattels. The court then proceeded to consider the effect of the garnishment when it was a debt that was subject thereto and the garnishee had become insolvent, so that it was necessary either to affirm that garnishment created some right or lien, or else turn the whole of the property over to subsequently attaching creditors. The conclusion reached was, that the judgment creditor by his garnishment of the debt acquired an inchoate right or lien by virtue of the garnishment against the property of the person garnished, and that the lien initiated by the garnishment gave the judgment debtor a right to share in the proceeds of the assets of the garnishee, notwithstanding his insolvency and the levy of writs of attachment thereon.<sup>240</sup> From the time of the garnishment, the effects in the garnishee's possession are considered as in custodia legis, and the garnishee is bound to keep them in safety, and, it was said by the supreme court of the United States, is not at liberty to change them, to convert them into money, or to exercise any act of ownership over them.<sup>241</sup> He acquires a special property in them as agent of the court,<sup>242</sup> and is entitled to hold them until the question of his liability is determined, as well

<sup>240</sup> *Montana N. B. v. Merchants' N. B.*, 19 Mont. 586, 61 Am. St. Rep. 532.

<sup>241</sup> *Brashear v. West*, 7 Pet. 608; *Mattingly v. Boyd*, 20 How. 128; *Biggs v. Kouns*, 7 Dana, 405. See *Stanleys v. Raymond*, 4 Cush. 814.

<sup>242</sup> *Erskine v. Staley*, 12 Leigh, 406.

against the defendant as against any subsequent purchaser or pledgee,<sup>243</sup> even though the attachment be against a person other than the ostensible owner from whom the garnishee received them.<sup>244</sup> They cannot lawfully be levied on and taken out of his possession;<sup>245</sup> but if that should be done, the officer seizing must hold them subject to the lien of the creditor who effected the garnishment.<sup>246</sup> If so taken,<sup>247</sup> or if taken from him by a wrongdoer,<sup>248</sup> it will not discharge the garnishee's liability; but it may furnish ground for delaying proceedings until damages can be recovered of the party taking them. But if the garnishing plaintiff cause a levy and sale under execution to be made of the property, he cannot afterward hold the garnishee in respect thereof.<sup>249</sup> It is, at all events, certain that no lien exists anterior to the service of the writ, or of the notice to appear.<sup>250</sup> Therefore, though the issuance and service of the writ is anticipated, the debtor may lawfully make payment of debts or deliver property until service upon him has been made.<sup>251</sup> Where the law authorizes the service of a writ by leaving a copy at the debtor's residence or place of business, he will be protected in payments made by him in good faith before receiving notice of such service.<sup>252</sup> In

<sup>243</sup> *Walcott v. Keith*, 2 Fost. 196.

<sup>244</sup> *Stiles v. Davis*, 1 Black. 101.

<sup>245</sup> *Scholefield v. Bradlee*, 8 Mart. 495; *Erskine v. Staley*, 12 Leigh, 406.

<sup>246</sup> *Burlingame v. Bell*, 16 Mass. 318; *Swett v. Brown*, 5 Pick. 178.

<sup>247</sup> *Parker v. Kinsman*, 8 Mass. 485.

<sup>248</sup> *Despatch Line v. Bellamy*, 12 N. H. 206.

<sup>249</sup> *Goddard v. Hapgood*, 25 Vt. 351, 60 Am. Dec. 272; *Olapp v. Rogers*, 38 N. H. 435.

<sup>250</sup> *Re Sistare's Estate*, 27 Abb. N. C. 34.

<sup>251</sup> *Wood v. Bodwell*, 12 Pick. 268; *Robinson v. Hall*, 3 Met. 301.

<sup>252</sup> *Williams v. Marston*, 3 Pick. 65. But the garnishee will not be released because after service upon him the property was surren-

California, the plaintiff in execution may, without asking leave of the court, bring an action directly against a garnishee who has disposed of property subject to the writ at the time of its service upon him.<sup>253</sup>

§ 413. **Suspension of Liability for Interest.**—Where money is garnished under an attachment, no judgment can be entered against the garnishee until after judgment has been rendered against the defendant in the principal suit. Until this last-named period, the garnishee is not justified in paying the money either to the defendant or to the plaintiff. He must keep the money or property to await the final result of the proceedings to which he has been made a party. While the property is thus tied up by operation of law, and can neither be used with safety, nor paid to either of the contending parties, it has always been considered that the garnishee, if free from fault on his part, and not occasioning nor contributing to the delay, ought not to be charged with any interest on the credit or money which is attached in his hands.<sup>254</sup> In proceedings supplemental to execution, the delay commonly attending proceedings under attachment rarely occurs. If, however, from any cause not attributable to the party summoned, a considerable delay should occur, and the money or credit be thus tied up and rendered unproductive in his hands, we have no doubt that he would be excused from paying interest thereon.

dered by his clerk, who knew nothing of the writ. *Farrell v. Pearson*, 26 Ill. 463.

<sup>253</sup> *Roberts v. Landecker*, 9 Cal. 262; *Robinson v. Tevis*, 38 Cal. 614; *Carter v. Los Angeles N. B.*, 116 Cal. 370.

<sup>254</sup> *Swamscot M. Co. v. Partridge*, 25 N. H. 369; *Fitzgerald v. Caldwell*, 2 Dall. 215; 1 Yeates, 274; *Updegraff v. Spring*, 11 Serg. & R. 190; *Willings v. Consequa*, Pet. C. C. 321; *Irwin v. Pittsburg*, 43 Pa. St. 488; *Georgia Ins. Co. v. Oliver*, 1 Kelly, 88; *Stevens v.*



**§ 414. Holds only Demands Existing at Service of the Notice.**—Where the effect of a garnishment depends upon common-law principles, free from statutory innovations, the authorities almost unanimously declare that it must be determined by the relations between the defendant and the garnishee at the date of the service of the writ.<sup>255</sup> Hence, where the garnishee was contingently liable to the defendant at the service of the writ, it was decided that he could not be held, although the liability afterward was freed from its contingent character, and became a fixed and certain debt.<sup>256</sup> In Maryland, a garnishee has always been held liable if he owed to defendant anything at the date of the trial of the garnishment suit, though no indebtedness existed at the service of the writ.<sup>257</sup> In

Gwathmey, 9 Mo. 636; Moore v. Lowrey, 25 Iowa, 336, 95 Am. Dec. 790; Blair v. Porter, 2 Beas. 267.

<sup>255</sup> Sands v. Roberts, 8 Abb. Pr. 343; Sanford v. Bliss, 12 Pick. 116; Caton v. Southwell, 13 Barb. 335; Allen v. Hall, 5 Met. 263; Tracy v. Bridges, 2 Miles, 352; Osborne v. Jordan, 3 Gray, 277; Gerregani v. Wheelwright, 3 Abb. Pr., N. S., 264; Wilcox v. Mills, 4 Mass. 218; Browning v. Bettis, 8 Paige, 568; Hadley v. Peabody, 13 Gray, 200; Brackett v. Blake, 7 Met. 339, 41 Am. Dec. 442; Wood v. Partridge, 11 Mass. 487; Haffey v. Miller, 6 Gratt. 454; Tyler v. Winslow, 46 Me. 348; Mace v. Heald, 36 Me. 136; Board of Ed. v. Scoville, 13 Kan. 29; Bean v. Miss. Union Bank, 5 Rob. (La.) 338; Davenport v. Swan, 9 Humph. 186; Wood v. Wall, 24 Wis. 647; Norris v. Burgoyne, 4 Cal. 409; Nash v. Gale, 2 Minn. 310; Old Second N. B. v. Williams, 112 Mich. 504; Matter of Trustees, etc., 50 N. Y. Supp. 171. In several decisions in New York, the general statement is made that the liability must have existed at the time the proceeding was commenced. Gray v. Ashley, 53 N. Y. Supp. 547; Columbian Institute v. Cregan, 11 Civ. Pro. Rep. 87; though in none of them did it appear that the liability arose after the commencement of the proceeding and before the service of the notice, and, hence, we do not know whether in that state such a liability can be reached otherwise than by instituting a new proceeding.

<sup>256</sup> Williams v. A. & K. R. R. Co., 36 Me. 201, 58 Am. Dec. 742; Meacham v. McCorbitt, 2 Met. 352.

<sup>257</sup> Glenn v. B. & S. Glass Co., 7 Md. 287.

some of the other states, by virtue of statutory regulations, the liability of a garnishee includes indebtedness existing at the time of his answer or disclosure, as well as that which existed at the service of the writ.<sup>258</sup>

It is not essential that the debt be due at the service of the notice, if it is then certain that it must become due at some subsequent date unless previously satisfied.<sup>259</sup> If the debt exists at the service of the writ, it is subject thereto, although its amount cannot be ascertained until some subsequent period.<sup>260</sup> It is, however, as already stated, necessary that the liability of the person summoned to the judgment debtor must inevitably subsequently become due, and it is not sufficient that there was a contingent liability at the service of the notice which was afterward freed from the contingency and became due absolutely. The person against whom the proceeding is instituted may be a tenant of the judgment debtor under an existing lease providing for its continuance for a definite time and for the payment of rents at stated periods, in which event the question presented is, whether, as to rents subsequently falling due, the liability of the lessee is

<sup>258</sup> *Franklin F. Ins. Co. v. West*, 8 Watts & S. 350; *Mahon v. Kunkle*, 50 Pa. St. 216; *Newell v. Ferris*, 16 Vt. 135; *Young v. Bank*, 51 Ill. 73; *Sheetz v. Hobensack*, 20 Pa. St. 412; *Mayer v. Chattahoochee N. B.*, 51 Ga. 325; *Sping v. Ayer*, 23 Vt. 516; *Edgerly v. Sanborn*, 6 N. H. 397; *Palmer v. Noyes*, 45 N. H. 174; *American Exch. N. B. v. Moxley*, 50 Ill. App. 314; *Planters' & M. Bank v. Floeck*, 17 Tex. Civ. App. 418; *Cent. P. R. R. Co. v. Sammons*, 27 Ala. 380. The rule in this state was formerly in accordance with common-law principles. *Hazard v. Franklin*, 2 Ala. 349; *Jones v. Howell*, 16 Ala. 695.

<sup>259</sup> *Davis v. Jones*, 65 How. Pr. 290. 8 Civ. Proc. R. 43.

<sup>260</sup> *Franklin F. Ins. Co. v. West*, 8 Watts & S. 350; *Knox v. Prot. Ins. Co.*, 9 Conn. 430, 25 Am. Dec. 33; *Nevins v. Rockingham*, 5 Fost. 22. As to the effect in the character and amount of the debt occurring after the service of the writ, see *Drake on Attachment*, § 670.

absolute or contingent. Certainly, many contingencies may occur to terminate the lease, before the time stipulated therein or otherwise, to destroy the right of the judgment debtor to receive the rents agreed to be paid to him. In our judgment, the liability existing in his favor is contingent, and, therefore, not subject to garnishment, nor to supplemental proceedings, except at periods when some rent has become due absolutely and remains unpaid.<sup>261</sup> In New York, however, the liability of a lessee in possession under a lease for rents to become due is treated as absolute, and, therefore, as subject to garnishment.<sup>262</sup>

If an order is made prohibiting the garnishee from transferring or disposing of his property, it can have no application to moneys received by him for services rendered after the entry of the order.<sup>263</sup> The same principle is, in our judgment, applicable to a landlord who has leased his property and to whom rents will become due at stated periods in the future, provided neither the lease nor the liability of the tenant to pay rents is terminated for some cause. It has, nevertheless, been repeatedly held in New York that a landlord cannot, after the granting of such an order, receive or release rents subsequently falling due under a pre-existing lease without being guilty of a contempt of court.<sup>264</sup>

<sup>261</sup> *Barnett v. Eastman*, 67 L. J. Q. B., N. S., 517.

<sup>262</sup> *Davis v. Jones*, 65 How. Pr. 290, 8 Civ. Pro. R. 43; *Stevens v. Dewey*, 43 N. Y. Supp. 130, 13 App. Div. 312.

<sup>263</sup> *Gerregani v. Wheelwright*, 3 Abb. Pr., N. S., 264; *Woodman v. Goodenough*, 18 Abb. Pr. 265; *Potter v. Low*, 16 How. Pr. 549; *Caton v. Southwell*, 13 Barb. 335; *Browning v. Bettis*, 8 Paige, 563; *McCoun v. Dorsheimer*, 1 Clarke Ch. 144.

<sup>264</sup> *Lertora v. Reimann*, 53 N. Y. Supp. 921; *Stevens v. Dewey*, 43 N. Y. Supp. 130, 13 App. Div. 312; *Mulford v. Gibbs*, 41 N. Y. Supp. 273, 9 App. Div. 490.

## THE ANSWER.

**§ 415. The Examination and Answer of the Person Summoned.**—The remarks made in a prior section,<sup>265</sup> concerning the extent and thoroughness of the examination to which the defendant must submit, are equally applicable to the examination of the persons and witnesses summoned in this proceeding.<sup>266</sup> The extent of the examination and the questions, an answer to which may be required, must, as in other cases, depend upon the objects of the inquiry and the issues involved. Where, as in Indiana, a proceeding supplementary to execution is a new action, having substantially the characteristics of a creditors' suit, and which may, therefore, result in a judgment finally determining the rights of all the parties before the court, the issues may be as varied and comprehensive as those of a creditors' suit, and the right to examine the witnesses and the parties must be equally extensive. Fraudulent transfers may there be attacked under proper pleadings and all the consequent issues tried and determined and relief awarded thereon.<sup>267</sup> In other states, however, where the person summoned does not concede his liability, a supplementary proceeding, in so far as it is directed against a third person, amounts only to an inquiry for the purpose of determining whether there is such probability that the person summoned owes the judgment debtor, or has the possession of personal property of the latter, that the creditor ought to be allowed to maintain an action for the purpose of determining this question. Necessarily, the person summoned and the witnesses subpoenaed may be required to answer to the extent of enabling the judge to intelli-

<sup>265</sup> See § 404.

<sup>266</sup> Drake on Attachment, §§ 641-645; Wade on Attachment, 366.

<sup>267</sup> Toledo etc. Co. v. Howes, 68 Ind. 458.

gently exercise the discretion with which he is invested in making an order, either that the proceeding be dismissed, or that the judgment creditor be allowed to commence an action to recover the debt or property which he claims to be subject to execution against the defendant.

The garnishee is not estopped from disputing his prior statements made out of court, although they have been the sole cause of the institution of the proceedings against him.<sup>268</sup> In Maine and Massachusetts, a person summoned under trustee process cannot be compelled to answer any question tending to impeach his title to real estate.<sup>269</sup> This rule has been repudiated in New Hampshire;<sup>270</sup> and we cannot ascertain that it has ever been recognized, except in the states already named. Whenever a garnishee discovers that he has committed any mistake in his answer, it is within the discretion of the court to permit him to amend or correct it.<sup>271</sup> This discretion ought always to be exercised in his favor, whenever it appears to the court that he has been acting in good faith. In some of the states the answer of a garnishee or trustee must be accepted as true. It cannot be disputed. If it does not establish the liability of the person answering, he must be discharged.<sup>272</sup>

<sup>268</sup> *Lewis v. Prenatt*, 24 Ind. 98, 87 Am. Dec. 321.

<sup>269</sup> *Boardman v. Roe*, 13 Mass. 104; *Moor v. Towle*, 38 Me. 183; *Russell v. Lewis*, 15 Mass. 127. Overruled as to personalty in *Devoll v. Brownell*, 5 Pick. 448.

<sup>270</sup> *Bell v. Kendrick*, 8 N. H. 520.

<sup>271</sup> *Smith v. Brown*, 5 Cal. 118; *Tapp v. Green*, 22 La. Ann. 42; *Stedman v. Vickery*, 42 Me. 132; *Crerar v. M. & St. P. R. R. Co.*, 35 Wis. 67; *Newell v. Blair*, 7 Mich. 103; *Russell v. Freedman's S. B.*, 50 Ga. 575; *Hovey v. Crane*, 12 Pick. 167; *Carrique v. Sidebottom*, 3 Met. 297; *Buford v. Welborn*, 6 Ala. 818; *Murrell v. Johnson*, 3 Hill (S. C.), 12.

<sup>272</sup> *Whitman v. Hunt*, 4 Mass. 272; *Kelly v. Bowman*, 12 Pick. 383; *Newell v. Blair*, 7 Mich. 103; *Laub v. Franklin M. Co.*, 18 Me.

The more generally accepted rule is, that the answer must be taken as *prima facie* true, but that it may be controverted and disproved.<sup>273</sup> In some of the states, it may be read on the trial as evidence against the plaintiff.<sup>274</sup> In others it cannot.<sup>275</sup> So, probably, the real effect of the answer is, in most of the states, like that of answers in other proceedings. It puts in issue the allegations of the plaintiff, and compels him to establish them by such competent evidence as may be sufficient to satisfy the judge or jury that they are true, and that the allegations set forth in the answer are untrue. The answer of the garnishee will never be distorted so as to bear unduly and unnaturally against him. But it is his duty to speak clearly and distinctly

187; *Barker v. Tabor*, 4 Mass. 81; *Cheatham v. Trotter*, Peck, 198; *Thomas v. Sprague*, 12 Mich. 120; *Wade on Attachment*, § 380; *Conner v. Allen*, 3 Head, 418; *Hawes v. Langton*, 8 Pick. 67; *Childress v. Dickins*, 8 Yerg. 113; *U. S. v. Langton*, 5 Mason, 280; *Moore v. Green*, 4 Humph. 299; *Brown v. Slate*, 7 Humph. 112. For effect of answer of trustee in New Hampshire, see *Burnham v. Dunn*, 35 N. H. 556.

<sup>273</sup> *Mason v. McCampbell*, 2 Ark. 506; *Britt v. Bradshaw*, 18 Ark. 530; *Kergin v. Dawson*, 1 Gilm. 86; *People v. Johnson*, 14 Ill. 342; *Rankin v. Simonds*, 27 Ill. 352; *Wilhelmi v. Haffner*, 52 Ill. 222; *Helme v. Pollard*, 14 La. Ann. 306; *Truit v. Griffin*, 61 Ill. 26; *Coleman v. Fennimore*, 16 La. Ann. 253; *Drake v. Buck*, 35 Iowa, 472; *Barnes v. Wayland*, 14 La. Ann. 791; *Blanchard v. Vargas*, 18 La. 486; *Thomas v. Sturges*, 32 Miss. 261; *Williams v. Jones*, 42 Miss. 270; *Davis v. Knapp*, 8 Mo. 657; *Holton v. S. P. R. R. Co.*, 50 Mo. 151; *Bloch v. Paul*, 10 Mo. 103; *Hess v. Shorb*, 7 Pa. St. 231; *Ellison v. Tuttle*, 26 Tex. 283; *Beck v. Cole*, 16 Wis. 95; *Erskine v. Sangston*, 7 Watts, 150; *Lashear v. White*, 88 Ill. 43; *Kelley v. Weymouth*, 68 Me. 197.

<sup>274</sup> *Schwab v. Gingerick*, 13 Ill. 697; *Wellover v. Soule*, 30 Mich. 481; *Devries v. Buchanan*, 10 Md. 210; *Fairfield v. McNany*, 37 Iowa, 75.

<sup>275</sup> *Myatt v. Lockhart*, 9 Ala. 91; *Price v. Mazange*, 31 Ala. 701; *Lasley v. Sisloff*, 7 How. (Miss.) 157; *Dawkins v. Gault*, 5 Rich. 451; *Keep v. Sanderson*, 12 Wis. 352; *Davis v. Knapp*, 8 Mo. 697; *Smith v. Heldecker*, 39 Mo. 157; *Cushing v. Laird*, 6 Ben. 408.

of the matters within his knowledge. If he uses language of doubtful import, and leaves it uncertain whether the allegations of the plaintiff are true or false, his answer will be construed against him. Here, as in other pleadings, doubtful language will be construed most strongly against the person using it.<sup>276</sup> Where the language is clear, and correctly states the facts, but a doubt arises with reference to their legal consequence, there is no reason why that doubt should be solved against the garnishee.<sup>277</sup> On the contrary, he ought to have the benefit of it, because no person ought to be subjected to a recovery, unless the law and the facts preponderate against him.<sup>278</sup> In Alabama, while the answer cannot be offered as evidence by the garnishee, it may by the plaintiff; but, when offered by the latter, he seems to be bound by it.<sup>279</sup> The result of this is, that the plaintiff must accept the truth of the answer as a whole, or else forego the benefit of any admission it may contain in his favor. This is unreasonable. The plaintiff ought not to be precluded from offering it in evidence, either for the purpose of contradicting the garnishee, and showing its inconsistency with other statements made by him, or of establishing that certain facts are admitted by the garnishee and are, therefore, no longer subjects of controversy. As to other facts, the plaintiff may introduce other com-

<sup>276</sup> *Sebor v. Armstrong*, 4 Mass. 206; *Cleveland v. Clap*, 5 Mass. 201; *Kelly v. Bowman*, 12 Pick. 383; *Scott v. Ray*, 18 Pick. 360; *Giddings v. Coleman*, 12 N. H. 153; *Sampson v. Hyde*, 16 N. H. 492; *Ormsbee v. Davis*, 5 R. I. 442; *Graves v. Walker*, 21 Pick. 160; *Hart v. Dahlgreen*, 16 La. 559; *Scales v. Swan*, 9 Port. 163.

<sup>277</sup> *Gordon v. Coolidge*, 1 Sum. 537; *U. S. v. Langton*, 5 Mason, 280.

<sup>278</sup> *McCoy v. Williams*, 1 Gilm. 584; *Williams v. Housel*, 2 Iowa, 154; *Morse v. Marshall*, 22 Iowa, 290; *Church v. Simpson*, 25 Iowa, 408; *Banning v. Sibley*, 3 Minn. 389; *Pioneer P. Co. v. Sanborn*, 3 Minn. 413; *Chase v. North*, 4 Minn. 381; *Cole v. Sater*, 5 Minn. 468.

<sup>279</sup> *Price v. Mazange*, 31 Ala. 701.

petent evidence to prove that the answer of the garnishee is untrue.<sup>280</sup> In Ohio, if the answer of a garnishee is not satisfactory to plaintiff, he may proceed by action against the garnishee and recover for the amount of property and credits which may be found in his possession belonging or due to the judgment debtor.<sup>281</sup>

**§ 416. Defenses Available to Garnishee.**—Proceedings supplemental to execution are instituted for the purpose of subrogating the plaintiff to the rights of the defendant, with respect to some debt owed to him from some third person, or to reach the defendant's rights to property in the hands of such third person. The utmost that plaintiff can claim is, that he be permitted to exercise all the rights belonging to the defendant. In no case can the plaintiff acquire a lawful claim to that to which the defendant had no claim, nor can the plaintiff resist any defense which, if made against the defendant, would prove successful. In considering the defenses which a garnishee may successfully interpose, we are led to treat—1. Of defenses having their origin in objections to the proceedings in the suit in which the garnishment issued; and 2. Of defenses to the cause of action which the plaintiff attempts to assert against the party summoned. With respect to defenses of the first class, it seems to be clear that the garnishee cannot object to mere errors in the proceedings, antecedent to the judgment under which he is summoned to appear. These errors can only be objected to by the defendant himself. If he sees proper to waive them, the garnishee will not be allowed to

<sup>280</sup> *Prentiss v. Danaher*, 20 Wis. 314; *Adlum v. Yard*, 1 Rawle, 163, 18 Am. Dec. 608.

<sup>281</sup> *Pennsylvania Railroad v. Peoples*, 31 Ohio St. 537.



urge that in which the defendant has thought it best to acquiesce.<sup>282</sup> When, notwithstanding an alleged error or irregularity in the judgment or other proceeding, it is so far valid that the judgment debtor cannot disregard nor collaterally impeach it, but, to obtain relief therefrom, must make some motion or prosecute some revisory or other proceeding, then, until relief has been sought and obtained by such motion or proceeding, a third person called before the court by proceedings supplemental to execution cannot, with success, urge such error or irregularity.<sup>283</sup>

If, however, the judgment is void for any cause, the apparent acquiescence of the defendant has no power to give it any vitality. It is, in legal effect, no judgment. The garnishee will not be protected in any payment he may make under it. He therefore not only may, but he must, avail himself of the void character of the judgment as a defense to any proceedings instituted against him thereon.<sup>284</sup>

Regarding defenses of the second class, the general rule obtains that the garnishee may avail himself of every defense which could have proved available in an

<sup>282</sup> *Earl v. Matheney*, 60 Ind. 205; *Schoppenhast v. Bollman*, 21 Ind. 285; *St. Louis P. C. Co. v. Cohen*, 9 Mo. 421; *Douglass v. Neil*, 37 Tex. 528; *Colt v. Haven*, 30 Conn. 190, 79 Am. Dec. 244; *Whitehead v. Henderson*, 4 Smedes & M. 704; *Matheney v. Galloway*, 12 Smedes & M. 475; *Foster v. Jones*, 1 McCord, 116; *Camberford v. Hall*, 3 McCord, 345; *Gunn v. Howell*, 35 Ala. 144, 73 Am. Dec. 484; *Hollingsworth v. Hammond*, 30 Ala. 668.

<sup>283</sup> *White v. Simpson*, 107 Ala. 386; *American C. I. Co. v. Hettler*, 46 Ill. App. 416; *Kirk v. Doran*, 171 Ill. 201; *Henry B. Co. v. Patt*, 73 Ia. 485; *Bucki v. Bucki*, 56 N. Y. Supp. 439.

<sup>284</sup> *Ford v. Hurd*, 4 Smedes & M. 683; *Pierce v. Carleton*, 12 Ill. 358, 54 Am. Dec. 405; *Berry v. Anderson*, 2 How. (Miss.) 649; *Hinman v. Andrews O. Co.*, 49 Ill. App. 135; *Kirk v. Doran*, 171 Ill. 207; *Gates v. Tusten*, 89 Mo. 13; *Greenhall v. Unger*, 45 N. Y. Supp. 1035; *Streissguth v. Reigelman*, 75 Wis. 212.

action brought against him by the defendant.<sup>285</sup> He may plead the statute of limitations;<sup>286</sup> or that the note on account of which he is summoned was given without any consideration;<sup>287</sup> or that it was assigned by the defendant previously to the service of the garnishment process;<sup>288</sup> or that the plaintiff's judgment has been satisfied;<sup>289</sup> or that the garnishee paid the debt or delivered the property to the defendant prior to the service of the writ.<sup>290</sup>

If the garnishee is summoned on account of property in his hands belonging to the defendant, he may defend himself to the same extent as if he were sued for such property by the defendant. If the property is not subject to execution, the garnishee may plead that fact in his defense. Although, as a general rule, the exemption of property from execution can only be claimed by its owner, yet this rule does not apply to proceedings by garnishment. If the garnishee has in his possession any property or credit of the defendant not subject to execution, he certainly may, and he probably must, assert the fact of such exemption, and thereby

<sup>285</sup> Drake on Attachment, c. 36; Myers v. Baltzell, 37 Pa. St. 491; Russell v. Hinton, 1 Murph. 468; Farmers' & M. Bank v. Little, 8 W. & S. 207; Sheldon v. Simonds, Wright, 724; Wade on Attachment, c. 42; Exposition R. I. Co. v. Canal St. E. R. Co., 42 La. An. 370; Oppenheimer v. First N. B., 20 Mont. 192; Colman v. Scott, 27 Neb. 77.

<sup>286</sup> Gee v. Warwick, 2 Hayw. (N. C.) 354; Hazen v. Emerson, 9 Pick. 144; Benton v. Lindell, 10 Mo. 557; Hinkle v. Currin, 2 Humph. 137.

<sup>287</sup> McCause v. McClure, 38 Mo. 410.

<sup>288</sup> Smyth v. Ripley, 33 Conn. 306; Churchman v. Robinson, 99 Ga. 786.

<sup>289</sup> Drake on Attachment, § 673; Hinkle v. Currin, 1 Humph. 74; Baldwin v. Merrill, 8 Humph. 132; Spring v. Ayer, 23 Vt. 516; Price v. Higgins, 1 Litt. 274; Gleason v. Gage, 2 Allen, 410; Howard v. Crawford, 21 Tex. 399.

<sup>290</sup> Drake on Attachment, § 674.

prevent the property from being taken and applied under the execution.<sup>291</sup> It is true that there are cases affirming that it is not the duty of the person garnished to make a defense on behalf of his creditor, and maintain that the latter must look out for his own interests and interpose such defenses as to him shall seem proper.<sup>292</sup> Of course, it must be conceded that a person entitled to an exemption may himself appear and urge his claim when his creditor is pursued by a proceeding supplemental to execution.<sup>293</sup> It may further be conceded that if he knows of the facts entitling him to an exemption, of which his debtor is not aware, he is blamable for not making such facts known to such debtor, and if the latter is subjected to a judgment because of his ignorance, such judgment may constitute a sufficient defense when his creditor seeks to compel him to make a second payment of the same obligation. When, however, the person summoned knows of a defense, as that the debt or property sought to be reached is exempt from execution, we believe that it is his duty to assert such defense, or, at least, to inform his creditor of the proceeding and give him an opportunity to act for himself, and if this duty is not performed, that no judgment or order against the person summoned

<sup>291</sup> *Winterfield v. M. & St. P. Ry. Co.*, 29 Wis. 589; *Lock v. Johnson*, 36 Me. 464; *Staniels v. Raymond*, 4 Oush. 314; *Caraker v. Matthews*, 25 Ga. 571; *Clark v. Averill*, 31 Vt. 512, 76 Am. Dec. 131; *Davenport v. Swan*, 9 Humph. 186; *Stebbins v. Peeler*, 29 Vt. 289; *Pierce v. C. & N. Ry. Co.*, 2 Cent. L. J. 377; *Claghorn v. Saussy*, 51 Ga. 576; *Butler v. Clark*, 46 Ga. 466; *Emmons v. Southern B. T. Co.*, 80 Ga. 760; *Mo. P. R. R. Co. v. Sharitt*, 43 Kan. 375, 19 Am. St. Rep. 143; *Carson v. Memphis etc. R. Co.*, 88 Tenn. 646, 17 Am. St. Rep. 921; *Mo. P. R. R. Co. v. Whipker*, 77 Tex. 14, 19 Am. St. Rep. 734.

<sup>292</sup> *Chicago etc. R. Co. v. Meyer*, 117 Ind. 563.

<sup>293</sup> *Blass v. Erber*, 65 Ark. 112, 67 Am. St. Rep. 907; *Seamans v. King*, 79 Ga. 611.

can protect him from liability to his creditor.<sup>294</sup> There are also other occasions when it becomes incumbent on a garnishee to assert a defense, to avoid being twice charged for the same debt. He may have notice of an assignment, or of some other matter or proceeding, by which he has ceased to be the debtor of the defendant. If from not availing himself of this defense a judgment is entered against him, its payment will not protect him from subsequent proceedings brought by the assignee, or other person who had succeeded to the defendant's rights.<sup>295</sup>

The person summoned may, prior to the service of notice upon him, have made some valid contract affecting the defendant's right to enforce the collection of the debt, or to demand the possession of the property. This contract, if made in good faith, cannot be avoided, impaired, or varied by the garnishment. The garnishee may assert it against the judgment creditor as fully as he was entitled to assert it against the judgment debtor.<sup>296</sup> Hence, if an attorney is employed to

<sup>294</sup> *Missouri Pac. R. R. Co. v. Sharitt*, 43 Kan. 375, 19 Am. St. Rep. 143; *Missouri Pac. R. R. Co. v. Whipker*, 77 Tex. 14, 19 Am. St. Rep. 734.

<sup>295</sup> *Colvin v. Rich*, 3 Port. 175; *Lamkin v. Phillips*, 9 Port. 98; *Hardy v. Hunt*, 11 Cal. 343, 70 Am. Dec. 787; *Walling v. Miller*, 15 Cal. 38; *Nugent v. Opdyke*, 9 Rob. (La.) 453; *Milliken v. Loring*, 37 Me. 408; *Prescott v. Hull*, 17 Johns. 284; *Bunker v. Gilmore*, 40 Me. 88; *Churchman v. Robinson*, 99 Ga. 786.

<sup>296</sup> *Drake on Attachment*, §§ 517-520, 593-597; *Baltimore & O. R. R. v. Wheeler*, 18 Md. 372; *Poe v. St. Mary's College*, 4 Gill, 499; *Curtis v. Norris*, 8 Pick. 280; *Armor v. Cockburn*, 4 Mart., N. S., 667; *Cutters v. Baker*, 2 La. Ann. 572; *Oliver v. Lake*, 3 La. Ann. 78; *Burnside v. McKinley*, 12 La. Ann. 505; *Swisher v. Fitch*, 1 Smedes & M. 541; *Owen v. Estes*, 5 Mass. 330; *Mayhew v. Scott*, 10 Pick. 54; *Lundie v. Bradford*, 26 Ala. 512; *Vincent v. Watson*, 18 Pa. St. 96; *Collins v. Brigham*, 11 N. H. 420; *White v. Richardson*, 12 N. H. 93; *Bray v. Wheeler*, 29 Vt. 514; *North Chicago R. M. Co. v. St. Louis O. & S. Co.*, 152 U. S. 596.

conduct certain litigation, and is paid his fee in advance, he cannot be compelled, by means of garnishment process, to surrender any portion of the money so received.<sup>297</sup> Any transaction entered into in good faith between the judgment debtor and the person cited to appear, whereby the latter has been released from liability to the former, is available against a judgment creditor; for supplemental proceedings are not for the purpose of prejudicing the garnishee or any other person, but only to have performed, in favor of the judgment creditor, some duty which otherwise was due to the judgment debtor. Therefore, if money is left by a judgment debtor with a third person, to be sent to another in a foreign country, and is recognized as the property of the latter, and the failure to transmit is due only to the inability to obtain a bill of exchange to advantage, such money is no longer the property of the judgment debtor, and cannot be reached to satisfy a judgment against him.<sup>298</sup> If an order is presented to a bank, to procure a loan thereon, and is indorsed for that purpose and placed on the counter, and the cashier is counting out the money, but, before it is given to the intending borrower, an officer appears and directs the cashier to stop payment, and thereupon the order is taken from the counter by such borrower, no title thereto vests in the bank, and hence no duty to pay over the money, and it cannot be garnished as the property of him who intended to borrow it.<sup>299</sup>

Ordinarily the defense of a garnishee, or a person cited to appear, must exist before the service of the

<sup>297</sup> *Randolph v. Randolph*, 34 Tex. 181; *Wheelock v. Tuttle*, 10 Cush. 123.

<sup>298</sup> *Howe v. Hyer*, 36 Fla. 12.

<sup>299</sup> *Gleason v. South Milwaukee N. B.*, 89 Wis. 534.

order or process upon him. He cannot change his relations to the judgment debtor after that time to the prejudice of the plaintiff,<sup>300</sup> nor can a person garnished or summoned to appear escape liability through his own negligence or inattention, as where moneys are paid after the service of the notice because of the failure to examine it and to be thereby informed of its contents.<sup>301</sup> Such defense does not, however, impose upon the person summoned any obligation which he did not owe to the judgment debtor. If an action is brought by a third person to recover the possession of the property alleged to belong to such debtor, and the garnishee gives notice thereof and is not asked to make any defense, he cannot be held answerable if the property is taken from his possession as a consequence of a judgment in such action.<sup>302</sup>

§ 417. **Offsets.**—The service of a garnishment, or of a notice to appear in proceedings supplemental to execution, does not prejudice the right of the person summoned to offset demands then due from him to the defendant, by presenting demands due to him from the defendant.<sup>303</sup> But such offset cannot be obtained after

<sup>300</sup> *Ennis v. Haralson*, 101 Ga. 282; *Henry v. Traynor*, 42 Minn. 234.

<sup>301</sup> *Cook v. Coleman*, 167 Mass. 414, 57 Am. St. Rep. 465; *Ward v. Ward*, 14 Wash. 640.

<sup>302</sup> *Neary v. Bohannon*, 68 Ill. App. 23.

<sup>303</sup> *Ashby v. Watson*, 9 Mo. 236; *Firebaugh v. Stone*, 36 Mo. 111; *Hathaway v. Russell*, 16 Mass. 476; *Manufacturers' Bank v. Morrill*, 12 Me. 117; *American Bank v. Wall*, 56 Me. 167; *Clarke v. Hawkins*, 5 R. I. 219; *Rankin v. Simonds*, 27 Ill. 350; *Picquet v. Swan*, 4 Mason, 443; *Beach v. Viles*, 2 Pet. 675; *Farmers' Bank v. Gettinger*, 4 W. Va. 305; *Seamon v. Bank*, 4 W. Va. 339; *Arledge v. White*, 1 Head, 241; *Sampson v. Hyde*, 16 N. H. 492; *Brown v. Warren*, 43 N. H. 430; *Strong v. Bass*, 35 Pa. St. 333; *Powell v. Sammons*, 31 Ala. 552; *Faxon v. Mansfield*, 2 Mass. 147; *Hazard v. Franklin*, 2 Ala. 849; *Price v. Masterson*, 35 Ala. 483; *Warfield v. Campbell*,

the service of the writ or notice, and then successfully employed to defeat its object.<sup>304</sup> No offset can, as a general rule, be available to the garnishee, unless, at the moment when he is served with the writ, such offset could have been asserted as a cause of action against the defendant. While in none of the states will the assertion of demands obtained after the service of the writ be permitted, yet there is a difference of opinion regarding demands existing at the service of the writ, and becoming due before the garnishee makes his answer or disclosure. Thus in Maryland, Massachusetts,<sup>305</sup> New Hampshire,<sup>306</sup> and Vermont,<sup>307</sup> the garnishee will be allowed for any offset existing at the time of his disclosure, though not due at the service of the writ, provided it is the fruit of some obligation or liability in being anterior to the service of the writ. The liability which is in these states sought to be enforced as an offset must be absolute. Therefore, if the person summoned is liable for the judgment debtor only as an indorser, and has not yet been compelled to make payment, and his liability to do so is still contingent, it cannot be allowed as an offset.<sup>308</sup> So the liability must be one which the person summoned is compelled to recognize and to which he has no defense. Thus, if he

38 Ala. 527. 82 Am. Dec. 724; *Fay v. Reager*, 2 Sneed, 200; *Fain v. Jones*, 3 Head, 308; *Nesbitt v. Campbell*, 5 Neb. 429; *O'Brien v. Collins*, 124 Mass. 98; *Brown v. Brown*, 55 N. H. 74; *Howe v. Hyer*, 36 Fla. 12.

<sup>304</sup> *Sayles' Tex. Civ. Stats.*, § 750; *Dyer v. McHenry*, 13 Iowa, 527.

<sup>305</sup> *Boston Type Foundry v. Mortimer*, 7 Pick. 166, 19 Am. Dec. 266; *Smith v. Stearns*, 19 Pick. 20; *Farmers' Bank v. Franklin Bank*, 31 Md. 404.

<sup>306</sup> *Boardman v. Cushing*, 12 N. H. 105; *Boston & M. R. R. v. Oliver*, 32 N. H. 172; *Swamscot v. Partridge*, 5 Fost. 369.

<sup>307</sup> *Strong v. Mitchell*, 19 Vt. 644.

<sup>308</sup> *Husted v. Stone*, 69 Vt. 149.

has made a promise which would be binding on him but for the statute of frauds, he cannot, after the service of notice on him, elect not to plead this defense, and, after satisfying his promise, assert a setoff on account thereof.<sup>309</sup>

In Alabama,<sup>310</sup> Arkansas,<sup>311</sup> Delaware,<sup>312</sup> Maine,<sup>313</sup> Connecticut,<sup>314</sup> and Pennsylvania,<sup>315</sup> and also in some of the federal courts,<sup>316</sup> the rule is imperative that the offset must be due when the garnishment is served. The rule that the garnishee can assert all offsets which he could have asserted in a suit brought against him by the defendant, is not more universally respected than is the other rule, that all offsets which could not be asserted in an action brought by the defendant are not available against proceedings by garnishment.<sup>317</sup>

It must be remembered that the garnishee's right to avail himself of a setoff is confined to cases where he is sought to be charged for a debt due from him to the defendant. If he has property belonging to the defendant, the fact that the latter is indebted to him can constitute no defense to an action brought for the recovery of such property, and hence it can neither be a

<sup>309</sup> *Garfield v. Rutland I. Co.*, 69 Vt. 549; *Strong v. Mitchell*, 19 Vt. 644.

<sup>310</sup> *Self v. Kirkland*, 24 Ala. 275.

<sup>311</sup> *Field v. Watkins*, 5 Ark. 672; *Watkins v. Field*, 6 Ark. 391.

<sup>312</sup> *Edwards v. Delaplaine*, 2 Harr. (Del.) 322.

<sup>313</sup> *Ingalls v. Dennett*, 6 Me. 79.

<sup>314</sup> *Parsons v. Root*, 41 Conn. 161.

<sup>315</sup> *Pennell v. Grubb*, 13 Pa. St. 552.

<sup>316</sup> *Taylor v. Gardner*, 2 Wash. C. C. 488.

<sup>317</sup> *Thomas v. Hopper*, 5 Ala. 442; *Gray v. Badgett*, 5 Ark. 16; *Blanchard v. Cole*, 8 La. 160; *Wells v. Mace*, 17 Vt. 503; *Norcross v. Benton*, 38 Pa. St. 217. Hence, it is said that an equitable offset cannot be allowed in a court of law. *Loftin v. Shackelford*, 17 Ala. 455; nor the garnishee's liability as surety. *Yongue v. Linton*, 6 Rich. 275; *Martin v. Solomons*, 10 Rich. 533.



defense nor a setoff to proceedings seeking to reach the same property by garnishment.<sup>318</sup> If, however, the garnishee has a lien on the property, he cannot be deprived of the benefit of such lien by proceedings in garnishment.<sup>319</sup> The onus of establishing his alleged offsets rests upon the garnishee.<sup>320</sup>

**§ 418. The Order to be Made After the Examination and Its Effect.**—When the examination has been completed, by taking the answers of the persons summoned, and of such witnesses as may have been called by the parties, if it clearly appears that the garnishee did not have any property of the defendant, and was not indebted to him, he ought to be discharged. It may, on the other hand, appear without dispute that the person summoned either owes the judgment debtor or has possession of his property which is subject to garnishment, or one or both of these facts may appear probable, but neither be admitted, in which event the necessity arises for the trial in some proceeding of the issue of fact respecting the liability of the person summoned either to pay any money or deliver any property. In either of the supposed contingencies, the question is presented of what order may the judge properly make and how may it be enforced. Whatever order be made, it must affect the judgment debtor in so far as it directs moneys or property, to which he is or was entitled, to be paid or delivered to a person other than himself. It has hence been claimed that a

<sup>318</sup> *Allen v. Hall*, 5 Met. 263.

<sup>319</sup> *Drake on Attachment*, § 532; *Nathan v. Giles*, 5 Taunt. 558; *Kirkman v. Hamilton*, 9 Mart. 297; *Nolen v. Crook*, 5 Humph. 312; *Smith v. Clarke*, 9 Iowa, 241; *Curtis v. Norris*, 8 Pick. 280; *Bank v. Levy*, 1 McMull. 431.

<sup>320</sup> *Pennell v. Grubb*, 13 Pa. St. 552.

statute authorizing an order to be made by the court or judge that the judgment creditor may sue the person summoned for the purpose of recovering a debt claimed to be due the judgment debtor is unconstitutional, because it affects his rights, and he is not a party thereto, nor, by the statute, required to be given notice thereof.<sup>321</sup> Any doubt heretofore existing upon this subject has, we think, been removed. Jurisdiction over the judgment debtor, having been acquired in the original action, may be exercised to the extent of making the judgment effective. Knowing that a judgment has been recovered against him, he must understand that proceedings may be taken to coerce its satisfaction, and must keep himself informed of such proceedings, and by the order permitting suit against his creditor and the suit itself, he will have sufficient notice to protect his interests, and he cannot with success assail as unconstitutional the statute authorizing the proceeding against his debtors for the purpose of reaching debts due from them and applying such debts to the satisfaction of his judgment creditor.<sup>322</sup>

It being, therefore, settled that in a supplementary proceeding some order may be made looking toward the collection of assets due the judgment debtor, and the obtaining possession of his property, which is claimed to be in the hands of the person cited to appear, the next question is, What may that order be? It must be conceded that it must not be such that it will deprive the person against whom it is made of any substantial right to which he would be entitled but for the supplementary proceeding. Thus, if he denies

<sup>321</sup> *Bryant v. Bank of California*, 8 W. C. Rep. 213.

<sup>322</sup> *High v. Bank of Commerce*, 95 Cal. 386, 29 Am. St. Rep. 121; *Hexter v. Clifford*, 5 Colo. 168.

the debt, or claims the property, or some interest therein, or some right to retain possession thereof, as against the judgment debtor, he has the right to have any issue which he may present relating to his liability tried in the regular, ordinary way, rather than by a summary proceeding, and to have the protection of a trial by jury. It is competent for the legislature to provide for all this in the original action, and to authorize issues to be formed therein and submitted on allegations, express or implied, to the jury, and a final judgment to be entered on their verdict. Where, however, the proceeding is before a judge, and it appears that the person or corporation alleged to have property of the defendant, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge will not make any peremptory order for the application of the property to the satisfaction of the judgment.<sup>323</sup> In any case where it appears doubtful whether the person summoned is indebted to the defendant, or, if indebted, whether he has the pecuniary ability to pay the debt, a peremptory order for its payment will not be made.<sup>324</sup> Generally, the statutes provide that the proper order in such a case is that the judgment creditor, or the sheriff, or a receiver, be permitted to bring an action to recover the debt or property, and, if apparently more stringent orders are authorized to be made, they will not be con-

<sup>323</sup> *West Side Bank v. Pugsley*, 47 N. Y. 368; *Edmonston v. McLoud*, 19 Barb. 357; *Goodyear v. Betts*, 7 How. Pr. 187; *Tompkins Co. Judge v. Trapp*, 21 How. Pr. 17; *Teller v. Randall*, 40 Barb. 242; *People v. Hurlburt*, 5 How. Pr. 446; 1 Code R., N. S., 75.

<sup>324</sup> *Patten v. Connah*, 13 Abb. Pr. 418; *Alexander v. Richardson*, 7 Robt. 63; *Sandford v. Moshier*, 13 How. Pr. 137; *People v. Hurlburt*, 5 How. Pr. 446.

strued as amounting to an adjudication against the claim made by a third person.<sup>325</sup>

If the person cited to appear denies that he is indebted to the judgment debtor, or asserts an adverse claim to property confessedly in his possession, but which is alleged to belong to such debtor, it is doubtful whether any judge or court can be authorized, in a summary proceeding, and without giving the person summoned the benefit of a trial by jury, to determine the issues thus presented, and, if found against the claimant, compel him to pay the debt or deliver the property for the purpose of satisfying the judgment.<sup>326</sup>

Though it be conceded that the person summoned is indebted to the judgment debtor, or has property of the latter which is subject to execution, it is still doubtful whether a judgment creditor is entitled to any remedy against the person so summoned to which the judgment debtor was never entitled. Thus, in either of the supposed contingencies, if the person summoned chose not to pay the debt, or was unable to do so, or if he refused to deliver the property, the only remedy of the judgment debtor would be by a civil action in which a judgment might be recovered and an execution thereon issued, and obedience to such judgment, or the satisfaction of such execution, could not ordinarily be coerced by a summary proceeding. The different statutes authorizing supplemental proceedings, however, contemplate that where the person summoned does not present any substantial issue respecting his liability, that the judge may make an order that he pay the debt

<sup>325</sup> *Lewis v. Chamberlain*, 108 Cal. 525; *In re Havlik*, 45 Neb. 747; *Frost v. Craig*, 9 N. Y. Supp. 528; *Waldron v. Walker*, 18 N. Y. Supp. 292; *Maass v. McEntegart*, 46 N. Y. Supp. 534; *Brown v. Edmonds*, 5 S. D. 508; *Blabon v. Gilchrist*, 67 Wis. 38.

<sup>326</sup> *Ex parte Grace*, 12 Ia. 208, 79 Am. Dec. 529.

or deliver the property in question to some officer, to be applied toward the satisfaction of the judgment. While an order in this form may be entered, we believe the better opinion is, that it is not enforceable otherwise than by action against the person thus found liable to contribute toward the satisfaction of the judgment.<sup>327</sup>

The order should not require the payment of a greater amount than is necessary to satisfy the plaintiff's debt.<sup>328</sup> An order for the delivery of property to be applied to the satisfaction of a judgment does not mean that any active measures shall be taken with it, nor that it shall be transferred to some other place, where it may be more convenient for the receiver or other officer to have it.<sup>329</sup> A person directed to make a delivery can properly refuse any active interference with the property, as where he, by words or acts, shows to the officer the property, and says: "Take it, if you wish, but others claim it, and I do not desire to be responsible for its taking."<sup>330</sup> An order directing the taking of the property from the place where it is to some other place for the purpose of delivery to a receiver is erroneous, and must be reversed if challenged on appeal. It is the duty of the receiver to take the property and bear whatever burdens may be involved in so doing and in transporting it to such place as he may desire it to be.<sup>331</sup>

<sup>327</sup> *Smith v. Brown*, 5 Cal. 118; *Brummagin v. Boucher*, 6 Cal. 16; *Hathaway v. Brody*, 25 Cal. 581; *West Side Bank v. Pugsley*, 47 N. Y. 368; *Union Bank of Rochester v. Union Bank of Sandusky*, 6 Oh. St. 254.

<sup>328</sup> *McDonald v. Creager*, 96 Ia. 659.

<sup>329</sup> *Severn v. Lowerre*, 23 N. Y. Supp. 1952.

<sup>330</sup> *Reardon v. Henry*, 82 Ia. 134.

<sup>331</sup> *Smith v. McQuade*, 59 Hun, 374.

As to the debtor's real property, it may vest in the receiver by virtue of his appointment, or of a conveyance directed to be made by the judgment debtor, but it has been held that there is no authority conferred by statute upon the court to make any order requiring the delivery of the possession of such property. Apparently, therefore, if the debtor refuses such delivery, the receiver, or any purchaser from him, must resort to some appropriate action to enforce his title and right of possession.<sup>332</sup>

In so far as the order seems to determine conflicting claims of title, or to require the delivery of property adversely held, or to authorize the receiver or other officer to take possession of it, it is beyond the jurisdiction of the court and void, and a writ of prohibition may issue to prevent action being taken under it. Thus where a person cited to appear held property transferred to him by the judgment debtor, as was alleged, for the purpose of defrauding the latter's creditors, but conveyed such property to W. on the day the supplementary proceeding was commenced, who, in turn, conveyed it to M., and the court found that the property belonged to the judgment debtor, and appointed a receiver to take possession thereof and subject it to the satisfaction of the judgment, it was held that the judge in so doing exceeded his power. "His only power," said the appellate court, "was to make an order authorizing the judgment creditor to institute an action in the proper court against the parties claiming the property for the recovery of the property, and the subjection of the same to the satisfaction of the debt, and for-

<sup>332</sup> *Canandaigua F. N. B. v. Marin*, 49 Hun, 571.

bidding the transfer of the property until such action might be commenced and prosecuted to judgment.”<sup>333</sup>

If the garnishee denies that he has the property in his possession or under his control, he tenders an issue as worthy of regular judicial inquiry and determination as if he admitted such possession and set up an adverse claim to the property, and the power to summarily convict him and punish him for contempt is not less questionable in the former case than in the latter. When the debt is denied, or an adverse claim to the property interposed by the person summoned, the court will authorize an action to be brought for the recovery of the property or debt, and will forbid the making of any transfer thereof until the action can be prosecuted to judgment. In some of the states the action may be prosecuted by the judgment creditor, but in most of them it must be instituted and carried on by a receiver appointed by the judge or court. The question of the ownership of property is very rarely litigated and determined by the judge or referee before whom the supplemental proceeding is conducted. Various important and difficult questions of law may, however, arise where the ownership of the property is free from dispute. Thus, it may be doubtful whether the property or debt sought to be made available to the plaintiff by this proceeding can be forced to contribute to the payment of its owner's debts, and if this doubt be settled in favor of the plaintiff, then it may still be necessary to decide whether, in the particular case, the property or debt is within the protection of the various exemption laws. All these questions must be litigated in the supplemental proceeding; and the

<sup>333</sup> McDowell v. Bell, 86 Cal. 615; Lewis v. Chamberlain, 108 Cal. 525; Wallace v. McLaughlin, 12 Utah, 411.

decision there made is not liable to collateral assault, and cannot be avoided or corrected otherwise than by appeal. As the person summoned is bound to yield obedience to the order or judgment entered against him, it would be the grossest injustice not to shield him from the recovery of the same demand by his creditor, the defendant in the judgment on which the supplemental proceeding was based. The garnishee in a domestic or foreign attachment, who paid over moneys in pursuance of the judgment therein entered against him, could always successfully plead the recovery and payment in bar to the prosecution of the same demand against him by his creditor, provided his conduct in the garnishment proceedings, had been characterized by good faith, and he had presented all the defenses known to him.<sup>334</sup> No doubt the same rule is applicable to proceedings supplemental to execution.<sup>335</sup>

But the order cannot protect the garnishee against the claims of one who was not a party to the proceed-

<sup>334</sup> *Providence S. Inst. v. Barr*, 17 R. I. 131; *Virginia etc. I. Co. v. New York C. U. Co.*, 95 Va. 515; *Hitt v. Lacy*, 3 Ala. 104, 36 Am. Dec. 440; *Mills v. Stewart*, 12 Ala. 90; *Killsa v. Lermond*, 6 Greenl. 116; *Taylor v. Phelps*, 1 Har. & G. 492; *Foster v. Jones*, 15 Mass. 185; *Barrow v. West*, 23 Pick. 270; *Holmes v. Remsen*, 20 Johns. 229, 11 Am. Dec. 269; *Coates v. Roberts*, 4 Rawle, 100; *Moore v. Spackman*, 12 Serg. & R. 287; *Drake on Attachment*, §§ 706, 707. As to plea of judgment recovered against garnishee, but remaining unpaid, see *Farmer v. Simpson*, 6 Tex. 303; *Cook v. Field*, 3 Ala. 53, 36 Am. Dec. 436; *Brannon v. Noble*, 8 Ga. 549; *Lowry v. Lumbermen's Bank*, 2 Watts & S. 210; *Brown v. Somerville*, 8 Md. 444, where such judgments are held not to support a plea in bar till satisfied. But the preponderance of the authorities is the other way. *Savage's Case*, 1 Salk. 291; *Turbill's Case*, 1 Saund. 67, note 1; *McDaniel v. Hughes*, 3 East, 367; *Matthews v. Houghton*, 11 Me. 377; *McAllister v. Brooks*, 22 Me. 80, 38 Am. Dec. 282; *Sessions v. Stevens*, 1 Fla. 233, 46 Am. Dec. 339; *Covert v. Nelson*, 8 Blackf. 265; *Cheongwo v. Jones*, 3 Wash. C. C. 359; *Perkins v. Parker*, 1 Mass. 117; *Hull v. Blake*, 13 Mass. 153. But the Massachusetts cases are modified by *Meriam v. Rundlett*, 13 Pick. 511.

<sup>335</sup> *Bostwick v. Bryant*, 113 Ind. 448.



ing, unless he was an assignee and exposed the garnishee to the peril of the order by his failure to make the assignment known.<sup>336</sup> Money belonging to a married woman was deposited by her in a bank in her own name. The bank was subsequently summoned before a judge, in proceedings supplemental to execution against her husband, in which proceedings both she and her husband were examined as witnesses. Pursuant to an order of the judge entered in these proceedings, the bank paid the deposit, to be applied on the judgment against the husband. It did not appear that she had any notice of the application for this order, or was heard in reference thereto. The order and consequent payment were held not to prejudice her right to recover her deposit from the bank. The court, in giving her judgment against the bank, said: "She has had no day in court, and if the payment by the defendant is held to be valid, then she has been deprived of her property without due process of law, and her constitutional rights thus violated. It can never be a defense that one who owes me money has, by an order or judgment of a court, in a proceeding to which I was not a party, been compelled to pay or deliver the money to another. If such were the rule, a bill of interpleader would rarely have been necessary, as the judgment of a court would always protect a defendant. The very object of interpleading conflicting claimants to money in the hands of a party willing to pay is to procure an adjudication which will protect him against double payment. In the case of conflicting claimants, an adjudication and payment, in an action by one claimant, would not bar the right of the other claim-

<sup>336</sup> Gibson v. Haggerty, 37 N. Y. 555; 5 Trans. App. 142, 97 Am. Dec. 752; Roy v. Banens, 43 Barb. 310.

ant, and no statute constituting such a bar could be upheld. Here, if plaintiff's husband had sued the bank, and recovered a judgment for this money, payment of such judgment would not have furnished a defense to an action by her to recover the same money, and certainly this order had no greater or more binding force than a judgment would have had.

"The general rule which holds that one shall not be affected by an adjudication to which he is not a party may sometimes work hardship, but the cases must be very rare in which a party holding property upon which there are conflicting claims cannot protect himself against double liability. Here the defendant knew that the plaintiff deposited this money as her own, and that she claimed it, and yet, without any effort to protect her rights, it paid the money in pursuance of an order made in a proceeding to which she was not a party. The bank should have resisted payment, or in some way made her a party to the proceeding. Hence, even if the judge had jurisdiction to make the order requiring the payment, and erred only in the exercise of his jurisdiction, as claimed by the counsel for the defendant, such order could not deprive plaintiff of her property, or protect the defendant in making the payment." <sup>337</sup>

So if an order is entered against a garnishee because of his failure to state truly all the facts known to him, it cannot protect him against a third person who was in fact entitled to the debt. This rule was applied where a garnishee had bought goods of brokers, with knowledge that they were not the owners of the goods, or under circumstances sufficient to put him upon inquiry, and he subsequently, in proceedings supplemen-

<sup>337</sup> Schrauth v. Dry Dock Savings Bank, 86 N. Y. 394.

tal to execution against the brokers, testified that he owed them for such goods, in consequence of which an order was entered against him to pay over the amount due, to be applied to the satisfaction of the judgment against the brokers. Payment having been made accordingly, it was held not to protect the garnishee against the principals of the brokers, because "the defendants had it in their power, by stating the facts of the case, to prevent the order being made. It was their duty to have done so, and omitting it, without reason or excuse, their after payment to the sheriff was, in effect, voluntary, and not compulsory." <sup>338</sup>

**§ 419. Receivers, their Appointment, Rights, and Duties.**—Most of the statutes providing for proceedings supplemental to execution authorize the appointment of a receiver.<sup>339</sup> Whether or not notice must be given to the judgment debtor of the application to appoint a receiver when the statute is silent upon the subject is doubtful. Some of the decisions affirm,<sup>340</sup> and others deny the necessity for such notice.<sup>341</sup> The Code of Civil Procedure of New York now requires "at least two days' notice of the application for the appointment of a receiver to be given personally to the judgment debtor, unless the judge is satisfied he cannot be found with reasonable diligence within the state, in which case the order must recite that fact, and may dispense

<sup>338</sup> *Wright v. Cabot*, 89 N. Y. 570; *Greentree v. Rosenstock*, 61 N. Y. 593; *Chicago etc. Co. v. Balmer*, 45 Ill. App. 59.

<sup>339</sup> Ohio Rev. Stats., § 5484; N. Y. Civ. Code Proc., §§ 2464-2471; S. C. Civ. Code Proc., § 318; Wis. Stats., § 2787; Iowa Code, § 4078; Kan. Civ. Code Proc., §§ 510-514.

<sup>340</sup> *Ashley v. Turner*, 22 Hun, 226; *Morgan v. Von Kohnstamn*, 9 Daly, 355.

<sup>341</sup> *Terry v. Bangs*, 9 N. Y. Supp. 311; *Whitney v. Welch*, 2 Abb. N. C. 442.

with notice, or may direct notice to be given in any manner which the judge thinks proper. But, where the order to attend and be examined, or the warrant, has been personally served on the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him.”<sup>342</sup> The right to the appointment of a receiver, having once attached, cannot be destroyed by any act of the debtor other than the satisfaction of the judgment, or some other act done, or condition arising, after which it is inevitable that the appointment cannot be of any advantage to the judgment creditor.<sup>343</sup>

A receiver should be appointed by the same judge before whom the proceeding was instituted, and by whom the order for the examination of the defendant, or other person, was made.<sup>344</sup> The appointment of a receiver is necessary whenever there are rights of action or equitable interests belonging to the judgment debtor which it is desired to convert into money, or when the judgment debtor's right of property or possession is substantially disputed, or when he, the garnishee, denies his indebtedness to the debtor or interposes an adverse claim to the property,<sup>345</sup> and also in any other cases in which it appears that the judgment debtor has property or an estate or interest therein, whether legal or equitable, which ought to be applied to the satisfaction of the judgment, but which, for some reason, cannot be

<sup>342</sup> C. C. P. N. Y., § 2464; *Strohn v. Epstein*, 14 Abb. N. C. 322, 6 Civ. Proc. Rep. 36.

<sup>343</sup> *Tomlin v. Webster M. Co.*, 34 Fed. Rep. 380.

<sup>344</sup> *Ball v. Goodenough*, 37 How. Pr. 479; *Smith v. Johnson*, 7 How. Pr. 39; *Corbin v. Berry*, 83 N. C. 27; *Clark v. Bergenthal*, 52 Wis. 103.

<sup>345</sup> *Bunacleugh v. Poolman*, 3 Daly, 236; *Dickinson v. Onderdonk*, 18 Hun, 479; *Rodman v. Henry*, 17 N. Y. 482; *Ormes v. Baker*, 17 N. Y. Week. Dig. 104; *Kimbrough v. Orr S. Co.*, 98 Ga. 537.

levied upon and sold under execution, as where he has letters patent for a valuable invention or owns a seat in a stock board.<sup>346</sup> Property in the custody of the law is not subject to levy and sale under execution. A judgment debtor may, however, have a valuable interest therein, which ought to be applied toward the satisfaction of his debt, and, where such interest remains subject to his voluntary sale and transfer, we see no reason why it may not be reached in supplementary proceedings by the appointment of a receiver.

There are other instances in which a receiver may be appointed, though the property sought to be reached may be levied upon and sold, as where that mode of proceeding may not furnish an efficient remedy.

If a claim is made that property has been transferred for the purpose of defrauding creditors, a receiver may be appointed, and his appointment cannot be successfully resisted on the ground that the creditors may treat such transfer as void, and levy their writs in defiance of it. The creditor is not obliged to incur the risk of such levy, but may have a receiver appointed for the purpose of testing the validity of the transfer by a creditor's bill.<sup>347</sup>

However numerous the proceedings against the judgment debtor may be, the statutes generally provide that only one receiver shall be appointed, or, in other words, the same person must act as receiver in all the cases.<sup>348</sup> It is no objection to the appointment of a receiver that the previous examinations have not

<sup>346</sup> *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63.

<sup>347</sup> *Todd v. Crooke*, 4 Sand. 694; *Heroy v. Gibson*, 10 Bosw. 591.

<sup>348</sup> *Myrick v. Selden*, 36 Barb. 15; *Bostwick v. Menck*, 40 N. Y. 383; *Andrews v. Glennville Woolen Co.*, 11 Abb. Pr., N. S., 78; *Sparks v. Davis*, 25 S. C. 381.

shown that the judgment debtor is possessed of any property subject to execution.<sup>349</sup> Nevertheless, a receiver should not be appointed where his appointment apparently will not be productive of any advantage to the plaintiff,<sup>350</sup> and in a few states it must, on the other hand, affirmatively appear, to support such an appointment, that the judgment debtor has property which may vest in the receiver and contribute to the satisfaction of the judgment.<sup>351</sup> So, though it is shown that the debtor has property subject to execution, a receiver will not, on that account, be appointed, unless it further appears that the remedy of seizing upon such property and selling it under the writ is embarrassed or inadequate.<sup>352</sup>

If the debtor has abundance of property for the satisfaction of the judgment, which can be reached by the ordinary process of levy and sale, the appointment of a receiver is clearly superfluous, and will be denied.<sup>353</sup> Another reason for such denial is, that if the debtor has real estate subject to execution, he is entitled to have it levied upon and sold in the ordinary mode, so that his statutory right to redeem from the sale will not be imperiled.<sup>354</sup>

In New York the judges differed upon the question whether a receiver could properly be appointed before an execution had been returned wholly or partly un-

<sup>349</sup> *Myer's Case*, 2 Abb. Pr. 476; *Bloodgood v. Clark*, 4 Paige, 574; *Browning v. Bettis*, 8 Paige, 568; *Fitzburgh v. Everingham*, 6 Paige, 29; *Bailey v. Lane*, 15 Abb. Pr. 373, note; *De Camp v. Dempsey*, 10 Civ. Pro. Rep. 210.

<sup>350</sup> *Bean v. Heron*, 65 Minn. 64; *Flint v. Zimmerman*, 70 Minn. 346.

<sup>351</sup> *Adler v. Turnbull*, 57 N. J. L. 62.

<sup>352</sup> *Moyer v. Moyer*, 7 App. Div. 523.

<sup>353</sup> *Second Ward Bank v. Upmann*, 12 Wis. 499.

<sup>354</sup> *Bunn v. Daly*, 24 Hun, 526; *Ashley v. Turner*, 22 Hun, 226; *Tinkey v. Langdon*, 60 How. Pr. 180.

satisfied. The majority, adopting for their guidance the rules of decision applicable to creditors' bills and other equitable proceedings, declined to proceed until the return of the writ had been made showing that the plaintiff's remedy at law had been exhausted.<sup>355</sup> The question has now been settled by statute, and the return of the writ is no longer a condition precedent to the appointment of a receiver.<sup>356</sup> In other states, the granting or refusing of the appointment of a receiver rests very much in the discretion of the court.<sup>356a</sup> If the evidence shows clearly that the defendant has no property not exempt from execution, it will be refused. If, on the other hand, it appears probable that he has property which the receiver might recover, it will generally be granted.<sup>357</sup>

Though the court should improvidently exercise its discretion and appoint a receiver before the plaintiff had exhausted his remedy by his writ of execution, or under any other circumstances in which the necessity for his appointment does not appear, its action, if erroneous and subject to reversal on appeal, is not void, and, therefore, cannot be collaterally assailed in an action brought by him in his official capacity.<sup>358</sup>

<sup>355</sup> *Hanson v. Tripler*, 3 Sand. 733; *Holbrook v. Orgler*, 40 N. Y. Sup. Ct. 33; 49 How. Pr. 289; *Andrews v. Glennville Woolen Mills Co.*, 11 Abb. Pr., N. S., 78; *Darrow v. Lee*, 16 Abb. Pr. 215. Contra, *Union Bank v. Sargeant*, 53 Barb. 422; 35 How. Pr. 87.

<sup>356</sup> Code Civ. Proc. N. Y., § 2464; *De Vivier v. Smith*, 6 N. Y. Civ. Proc. R. 394.

<sup>356a</sup> *Bean v. Heron*, 65 Minn. 64; *Flint v. Zimmerman*, 70 Minn. 346.

<sup>357</sup> *Colton v. Bigelow*, 41 N. J. L. 266; *Flint v. Webb*, 25 Minn. 263; *Knight v. Nash*, 22 Minn. 452. In California, a receiver may be appointed "in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment." Code Civ. Proc. Cal., § 564, subd. 4.

<sup>358</sup> *Steifel v. Berlin*, 51 N. Y. Supp. 147, 28 App. Div. 103.

From the time of his appointment, the receiver in supplemental proceedings represents both the judgment creditor and judgment debtor,<sup>359</sup> and is also considered as a general trustee for all the creditors of the judgment debtor.<sup>360</sup> Like other trustees, his acts in contravention of his trust will not be permitted to injure the beneficiaries. He cannot waive the right of the creditors to assail fraudulent transfers or liens,<sup>361</sup> nor can he determine what disposition shall be made of money or property in his official capacity, and, if he pays out or surrenders possession of either without first seeking the advice and direction of the court, he must show that his action was proper. Otherwise he must account as if such money or property remained in his possession.<sup>362</sup>

By virtue of his appointment and qualification, the receiver becomes invested with all the personal estate of the judgment debtor which is liable to be forced to contribute to the payment of his debts.<sup>363</sup> As regards this personal estate, no assignment from the defendant to the receiver is necessary, and an order of the judge or court directing such assignment is erroneous.<sup>364</sup>

In New York, it was formerly held that the defendant's real estate did not vest in the receiver by virtue

<sup>359</sup> *Cumming v. Egerton*, 9 Bosw. 684.

<sup>360</sup> *Bostwick v. Belzer*, 10 Abb. Pr. 197; *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519.

<sup>361</sup> *Mumford v. Crouch*, 8 App. Div. 529.

<sup>362</sup> *In re Hone*, 153 N. Y. 522.

<sup>363</sup> *Moak v. Coates*, 33 Barb. 498; *Chautauque Co. Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Barnes v. Morgan*, 6 Thomp. & C. 108; 3 Hun, 705. But no matter how comprehensive may be the language of the order appointing a receiver, it will never be interpreted as including property exempt from execution. *Finnin v. Malloy*, 33 N. Y. Sup. Ct. 382; *Andrews v. Rowan*, 28 How. Pr. 126.

<sup>364</sup> *Ball v. Goodenough*, 37 How. Pr. 479; *Ten Broeck v. Sloo*, 13 How. Pr. 28, 2 Abb. Pr. 234.



of the appointment. A conveyance to him was essential,<sup>365</sup> and this the defendant was compelled to execute.<sup>366</sup> At the present time, in that state, no conveyance is necessary, and real property vests in the receiver from the time when an order appointing him or a certified copy thereof is filed with the clerk of the county where such property is situated.<sup>367</sup> The title of the receiver is that only which the judgment debtor had, and is hence subject to all pre-existing liens.<sup>368</sup> It is a qualified and not an absolute title. It is "in the nature of security for the plaintiff in the judgment; it does not divest the debtor of his legal title, but the latter's conveyance of the premises would be subject to the claim of the receiver."<sup>369</sup> That it is not the legal title we cannot concede; but we admit that it is held in trust, and that an estate or interest remains in the judgment debtor, which he may convey to others, and his conveyance vests them with the title, if the judgment should be satisfied without a sale of the property and the trust be thereby discharged. It is, therefore, not proper for the court to order the debtor to convey to the receiver,<sup>370</sup> for the title is already in him; and such conveyance, if made, may give the receiver a title

<sup>365</sup> *Moak v. Coates*, 33 Barb. 498; *Chautauque Co. Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347.

<sup>366</sup> *Fenner v. Sanborn*, 37 Barb. 610.

<sup>367</sup> Code Civ. Proc. N. Y., § 2468; *Manning v. Evans*, 19 Hun, 500; *Cooney v. Cooney*, 65 Barb. 524; *Hayes v. Buckley*, 53 How. Pr. 173; *Harrison v. Maxwell*, 44 N. J. L. 316. In New Jersey, it has, however, been determined that a receiver in supplemental proceedings acquires title to personal property only. Hence, if it is desired to reach interests in real estate which, though liable to be applied to the satisfaction of a judgment, cannot be reached by execution, the remedy of the judgment creditor must be by a creditor's suit. *Skinner v. Terhune*, 45 N. J. Eq. 565.

<sup>368</sup> *Dann M. Co. v. Parkhurst*, 125 Ind. 317.

<sup>369</sup> *Faneull Hall N. B. v. Bussing*, 147 N. Y. 665.

<sup>370</sup> *Moyer v. Moyer*, 7 App. Div. 523.

in addition to that vesting in him by his appointment, and affect the debtor's right to dispose of his interest and that of his heirs to inherit it as real estate.<sup>371</sup> In California, it has been the practice to require the debtor to make an assignment to the receiver in supplemental proceedings,<sup>372</sup> though there has been no decision holding that, without such transfer, he would be without title. It has been held that, because an act of Congress requires transfers of interests in, or of the title to, letters patent to be in writing, attended with certain formalities, such transfers cannot be consummated merely by the appointment of a receiver, and hence, to reach such an interest, the debtor must be compelled to execute a formal assignment to the receiver.<sup>373</sup>

The title vested in the receiver, as already suggested, is that only which the debtor had at the time of the appointment. The chief object of the receivership may be to reach and subject to execution property fraudulently transferred. Such a transfer is, for most purposes, deemed inoperative and void as against creditors,<sup>373a</sup> and, as a receiver represents them, he is entitled to treat such transfers as they were entitled to treat them; but even creditors can assail such transfers only by levying execution on the property attempted to be transferred, or by maintaining a creditors' suit to have the transfer adjudged fraudulent and the property directed to be sold free therefrom. A receiver cannot take out execution and make a sale in disregard of the alleged fraudulent transfer, for the title to the

<sup>371</sup> *Graham v. Lawyers' T. I. Co.*, 46 N. Y. Supp. 1055.

<sup>372</sup> *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63.

<sup>373</sup> *Newton v. Buck*, 72 Fed. Rep. 777.

<sup>373a</sup> Ante, §§ 136, 139.

judgment is vested in the judgment creditor and not in the receiver. Hence, it is held that his only remedy is to maintain a suit as the representative of the creditors, wherein he may have the transfer declared fraudulent, and the property directed to be sold to the extent necessary to satisfy the demands of the creditors for whose benefit he has been appointed.<sup>374</sup> If, however, property of the debtor is subject to a pledge or lien, title vests in the receiver subordinate thereto, and he may take such measures as may be necessary to redeem therefrom.<sup>375</sup>

The title of the receiver does not relate back to any time anterior to his appointment,<sup>376</sup> and it probably does not commence, even with respect to personalty, until he has filed his appointment and done such other acts as are necessary to qualify him for entering upon the performance of the duties of his office.<sup>377</sup> Neither does the title of the receiver embrace any property acquired by the defendant subsequently to his appointment or qualification.<sup>378</sup> Hence, if exempt property is destroyed by fire after the qualification of the receiver, the proceeds of an insurance effected thereon are regarded as in the nature of a subsequent acquisition,

<sup>374</sup> *Metcalf v. Del Valle*, 64 Hun, 245; *Bostwick v. Menck*, 40 N. Y. 383; *Ward v. Petrie*, 157 N. Y. 301, 68 Am. St. Rep. 790.

<sup>375</sup> *Armstrong v. McLean*, 153 N. Y. 490.

<sup>376</sup> *Becker v. Torrance*, 31 N. Y. 631; *Stewart v. Foster*, 1 Hilt. 505; *Campbell v. Genet*, 2 Hilt. 295; *Fillmore v. Horton*, 31 How. Pr. 424; but by Code Civ. Proc. N. Y., § 2469, the receiver's title relates back to the inception of the proceedings except against a bona fide purchaser.

<sup>377</sup> *Rogers v. Corning*, 44 Barb. 229; *Conger v. Sands*, 19 How. Pr. 8; Code Civ. Proc. N. Y., § 2468; *Moyer v. Moyer*, 40 N. Y. Supp. 258, 7 App. Div. 523; *Rose v. Baker*, 99 N. C. 323.

<sup>378</sup> *Guild v. Meyer*, 56 N. J. Eq. 183; *Graff v. Bonnett*, 25 How. Pr. 470; *Campbell v. Foster*, 16 How. Pr. 275; *Du Bois v. Cassidy*, 75 N. Y. 298.

and do not vest in the receiver.<sup>379</sup> Property subject to execution, on the other hand, doubtless vests in the receiver as fully and effectually as it was held by the defendant; and he is entitled to all the rights and privileges to which the defendant would have been entitled had not the appointment been made. His title cannot be impaired by any lien created, or any proceeding taken, against the judgment debtor after the interest of the latter has been divested by the supplementary proceedings.<sup>380</sup> If the estate of the judgment debtor consists of real property which has been sold under execution, he may receive and enjoy the rents, during all the time in which the defendant would have been entitled to receive and enjoy them,<sup>381</sup> and may, if he thinks proper, effect a redemption from the sale.<sup>382</sup> If the defendant was a tenant by the curtesy,<sup>383</sup> or a widow entitled to dower,<sup>384</sup> the receiver will be entitled to all the rents, profits, and proceeds accruing to such tenant or widow during the continuance of the receivership.

The receiver represents both the creditors and the debtor. He may sue to recover any property which could be recovered either by the debtor or by the creditors, or by both combined. He can, therefore, maintain an action to set aside a fraudulent conveyance made by the debtor,<sup>385</sup> but he can sustain such action

<sup>379</sup> *Sands v. Roberts*, 8 Abb. Pr. 343.

<sup>380</sup> *McCorkle v. Herman*, 117 N. Y. 297; *Levasseur v. Mason* (C. A. 1891), 2 Q. B. 73.

<sup>381</sup> *Farnham v. Campbell*, 10 Paige, 598.

<sup>382</sup> Code Civ. Proc. N. Y., §§ 1449-1454.

<sup>383</sup> *Beamish v. Hoyt*, 2 Robt. 307; *Ellsworth v. Cook*, 8 Paige, 643.

<sup>384</sup> *Payne v. Becker*, 87 N. Y. 153; *Stewart v. McMartin*, 5 Barb. 438.

<sup>385</sup> *Underwood v. Sutcliffe*, 77 N. Y. 58; *Steiffel v. Berlin*, 45 N. Y. Supp. 746; *Bostwick v. Menck*, 40 N. Y. 383; *Kennedy v. Thorpe*,

only so far as may be necessary to secure the rights of the creditors whom he represents. Where property has been fraudulently conveyed by the defendant, the receiver has no lien thereon by virtue of his appointment. He can only acquire such lien by commencing an action for the recovery of the property.<sup>386</sup> Generally speaking, a receiver may maintain any action at law or suit in equity in aid of, or necessary to accomplish, the purposes for which he was appointed, and to that end may compel an accounting respecting any funds or property in which the debtor has an interest,<sup>387</sup> unless it is exempt from execution. But, on the other hand, he should not be permitted to prosecute any suit which is clearly unnecessary, as where it appears that the claims which he represents are abundantly secured and must inevitably, or in all probability, be satisfied without his pursuing the remedy in question.<sup>388</sup> The actions which the receiver may prosecute must necessarily be extended to, and restricted by, the title which vests in him and the purposes for which he is authorized to assert it. To a limited extent, he represents both the judgment debtor and the judgment creditor, but each may have rights and causes of action which remain wholly his notwithstanding the receivership. The debtor may have property and rights of action which are not only exempt from execution at law, but are also not subject to any proceeding in equity in aid of exe-

8 Abb. Pr., N. S., 131; *Hamlin v. Wright*, 23 Wis. 491; *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519.

<sup>386</sup> *Fields v. Sands*, 8 Bosw. 685; *Ward v. Petrie*, 92 Hun, 605; *Mandeville v. Avery*, 124 N. Y. 376, 12 Am. St. Rep. 678; *Stephens v. Perrine*, 143 N. Y. 476.

<sup>387</sup> *Prescott v. Pfeiffer*, 57 Mich. 21; *Masten v. Amerman*, 20 Abb. N. C. 443; *Armstrong v. McLean*, 153 N. Y. 490; *Weill v. Wilmington F. N. B.*, 106 N. C. 1.

<sup>388</sup> *Gifford v. Rising*, 50 Hun, 42.

cution. If so, this property and these rights do not pass to the receiver, and he cannot maintain any action respecting them. A receiver does not succeed to any title or right of action held by the judgment debtor other than that of pursuing such remedies as are necessary to vacate fraudulent transfers and to subject property to execution which cannot be levied upon and sold under that writ.<sup>389</sup> Therefore, if the plaintiff has

<sup>389</sup> Ward v. Petrie, 157 N. Y. 301, 68 Am. St. Rep. 790. We know of no opinion which considers, so thoroughly as that in this case, the title, rights, and remedies of receivers in supplementary proceedings, and, hence, quote therefrom the following: "This action is an excursion by a receiver into a new field. It is an action at law brought by the plaintiff, as receiver in supplementary proceedings, to recover damages from the judgment debtor and another for a fraudulent conspiracy to prevent the collection of the judgment creditor's debt, which, although in existence, was not in judgment at the time the conspiracy was formed and executed. As the authority of the plaintiff to maintain such an action is challenged, it becomes necessary to examine the statute authorizing his appointment and governing his powers. The Code of Civil Procedure, by section 2464, authorizes the appointment of a 'receiver of the property of the judgment debtor.' Section 2468 provides that 'the property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him,' subject to certain exceptions not now material. When the receiver's title to personal property has thus become vested, 'it also extends back by relation, for the benefit of the judgment creditor in whose behalf the special proceeding was instituted, . . . so as to include the personal property of the judgment debtor, at the time of the service of the order': Code Civ. Proc., § 2469. If it appears from due proof that the judgment debtor has in his possession, or under his control, money or personal property belonging to him, or that a third person has possession or control of the same, and the right of the judgment debtor is not substantially disputed, an order may be made by the judge in charge of the proceeding in his discretion, for the payment of the money or the delivery of the property to the sheriff or to a receiver, if one has been appointed. Code Civ. Proc., § 2447. The receiver is subject to the control of the court out of which the execution was issued (Code Civ. Proc., § 2471), and his duties, subject to such control, are to take possession of the tangible property of the judgment debtor, not exempt by law, and convert it into money to the best advantage; to collect the intangible assets, and out of the proceeds to pay fees and

an independent cause of action to recover for some wrong done him in embarrassing or destroying his rem-

expenses, and apply the balance upon the debt of the judgment creditor, returning the remainder, if any, to the judgment debtor. He represents the judgment debtor, and can bring any action relating to property rights that he might bring because he has his title. He also represents the judgment creditor in equity to the extent necessary to bring actions in the nature of a creditor's bill to set aside fraudulent transfers, for 'he comes in by the act of the law and not by the act of the party.' *Porter v. Williams*, 9 N. Y. 142, 149, 59 Am. Dec. 519; *Underwood v. Sutcliffe*, 77 N. Y. 58, 62; *Mandeville v. Avery*, 124 N. Y. 376, 385, 21 Am. St. Rep. 678. He is trustee for the judgment creditor to receive, and to remove obstacles by equitable procedure so that he may receive, the property of the judgment debtor, and apply the proceeds on the debt which is the foundation of his authority. He takes the legal title to all the personal property of the debtor, whether in his own hands or in the hands of others, as of the date of the service of the order in supplementary proceedings, but not so as to affect the title of a purchaser in good faith. Code Civ. Proc., § 2469; *McCorkle v. Hermann*, 117 N. Y. 297, 302. The title to property, however, transferred by the judgment debtor in fraud of creditors, prior to the service of the order for examination upon him, is good as against the receiver until he has caused the transfer to be set aside by a decree in equity. *Bostwick v. Menck*, 40 N. Y. 383. Until then he has an equitable right, but no title. While the title of a fraudulent transferee is not good as against the sheriff armed with an execution against the property of the judgment debtor, as he may levy upon the property, sell it, and run the risk of being able to prove the fraudulent nature of the transaction when he is sued, it is good as against the receiver, who has no legal process, until the transfer is formally set aside. The receiver can maintain an action against the judgment debtor in conversion, where the debtor has converted property after it became vested in the receiver. *Gardner v. Smith*, 29 Barb. 68; but it has been held that he cannot maintain replevin to recover articles of personal property which were transferred in fraud of his creditors, prior to the appointment of the receiver. *Pettibone v. Drakeford*, 37 Hun, 628. In *Metcalf v. Del Valle*, 64 Hun, 245, it was held that the title of a receiver in supplementary proceedings extended only to the property which the judgment debtor had when the receiver was appointed, and that it did not include property which the judgment debtor had fraudulently transferred prior to such appointment. When the case reached this court it was affirmed on the authority of *Bostwick v. Menck*, 40 N. Y. 383. So, an administrator does not take title to chattels fraudulently



edy under his writ, it does not vest in the receiver and cannot be enforced by him. Thus, if a conspiracy has

assigned by his intestate, and can only avoid the transfer by proceeding in equity under the statute authorizing it. *Osborne v. Moss*, 7 Johns. 161, 5 Am. Dec. 252; *Brownell v. Curtis*, 10 Paige, 210. If the plaintiff can maintain this action at law, it must be because the title to the cause of action vested in him by virtue of his appointment as 'receiver of the property of the judgment debtor.' Code Civ. Proc., § 2464. What does a receiver in supplementary proceedings receive? He receives simply 'the property of the judgment debtor,' according to the express command of the statute. 'The title to the property of the judgment debtor is vested in him, and he is entitled to 'receive' all of it, except such as is exempt from execution. The property belonging to, and in the possession of, the judgment debtor, he is entitled to take without legal process, and, if the judgment debtor resists, to apply to the court for an order compelling him to deliver it. In addition to this, however, he has an equitable right to property fraudulently transferred by the judgment debtor, and can reinstate the title in him by a suit in equity, and then receive it. If such property is voluntarily surrendered by the transferee upon demand, he is entitled to take it and dispose of it, the same as if it had never been transferred. If it is not voluntarily surrendered, he cannot take it by force, but, by virtue of the statute, he is entitled to maintain an action in equity to set aside the fraudulent transfer, so that he may receive the property which, in equity and good conscience, belongs to the judgment debtor. Such an action, however, cannot be maintained in a county court, for the want of jurisdiction of an equitable action of that kind: Code Civ. Proc., § 340. There is no statute and no rule of law which entitles him to 'receive' anything that does not belong to the judgment debtor, who, in the case before us, had parted with title, possession, and the right of possession, before the receiver was appointed. He is not entitled to receive any right of action belonging to the judgment creditor, although he is authorized to bring an action to set aside fraudulent transfers, the same as the judgment creditor himself might have done. We find no case holding that he represents the judgment creditor to the extent of bringing an action at law, even if the judgment creditor might have brought one, to recover damages for a fraudulent conspiracy to prevent the collection of his debt, carried into effect before the proceedings were commenced which resulted in the appointment of the receiver. He is the receiver of the property of the judgment debtor, not of the judgment creditor, and such a right of action is the property of the latter, not of the former. He represents the creditor only with reference to the property of the debtor, who cannot have



been entered into between the judgment debtor and others, to prevent the collection of the debt, and the

a cause of action against himself. The defendants did nothing to affect the title of the receiver after his appointment, for the fraudulent transfer was complete, even as to possession, before supplementary proceedings were commenced. What they did would be ineffectual as against his equitable right to the property transferred, when asserted in the proper manner, for he could follow the property in equity, at least until it reached the hands of a bona fide purchaser. Code Civ. Proc., § 181. So far, however, as the action of the defendants gave a right of action at law to anyone, it was to the judgment creditor only, and that right did not pass to the plaintiff, on his appointment, nor did he represent the creditor with reference to it. The judgment creditor could not assert that right through the plaintiff, who could receive under the statute the property of the judgment debtor only. The receiver could not receive a right of action for a tort that accrued, if at all, before the judgment was recovered upon which his title was founded. Whether the judgment creditor could maintain an action at law to recover damages on account of the fraudulent transfer made before he recovered judgment or had any lien, legal or equitable, it is not necessary to decide. The following cases are relied upon by the plaintiff as justifying such an action: *Yates v. Joyce*, 11 Johns. 136; *Van Pelt v. McGraw*, 4 N. Y. 110; *Quinby v. Strauss*, 90 N. Y. 664; *Findlay v. McAllister*, 113 U. S. 104. On the other hand, the defendants insist that such an action cannot be maintained, because their acts, when done, did not injure any security of the creditor, for he had none at the time, and, in support of this position, they cite the following: *Braem v. Merchants' N. B.*, 53 Hun, 638; 6 N. Y. Supp. 846; affirmed, 127 N. Y. 508; *Adler v. Fenton*, 24 How. 407; *Hutchins v. Hutchins*, 7 Hill. 104; *Brinkerhoff v. Brown*, 4 Johns. 671; *Hurwitz v. Hurwitz*, 10 Misc. Rep. 353. We do not think it necessary to decide the question in this case, because, as we have already held, such a right of action could only be asserted, if at all, by the creditor himself, in his own name, and not through a receiver. It is, however, insisted that this action is authorized by chapter 314 of the Laws of 1858, as amended by chapter 740 of the Laws of 1894. It has been held that the class of receivers referred to in this act are those who are vested, as such, with all the property of the insolvent, for the benefit of all the creditors, and not to a receiver appointed in supplementary proceedings, for the benefit of a single creditor only. *Pettibone v. Drakeford*, 37 Hun, 628. This, if not so held, was plainly intimated in *Underwood v. Sutcliffe*, 77 N. Y. 58, 62. But, whether this is so or not, we do not think that said statute authorizes any receiver, however appointed, to maintain such an action as

prosecution of that conspiracy has resulted in damages to the creditor, no action to recover such damages can be maintained by the receiver.<sup>390</sup> "The duties of a receiver, in proceedings supplementary to execution, are fixed by law. They are to appropriate the property of the judgment debtor to the satisfaction of the judgment under which he was appointed, and any other to which his receivership may be extended, and to restore the surplus, if any, to the judgment debtor." The court has no power, in the absence of personal notice to the debtor, to make an order that the receiver pay any part of the funds in his hands to satisfy a judgment other than that under which the receiver was appointed.<sup>391</sup>

**§ 420. All the Kinds of Property Subject to Levy and Sale, or to Garnishment, may, no doubt be reached by**

the one under consideration. This action does not attempt to follow the property and recover it, or the value thereof, so that the receiver may apply the proceeds upon the debt in question. It is not an action to replevy the property or to recover damages for the conversion thereof or to set aside the fraudulent mortgage. It treats the property as a mere incident to the cause of action, and is founded on the theory of a fraudulent conspiracy to prevent the collection of a debt held at the time by a simple contract creditor. The statute under consideration enables a receiver or other trustee of an estate to follow specific property transferred in fraud of the rights of creditors, and makes the persons receiving such property liable in the proper action for the same or its value. This liability is not imposed on the one making the fraudulent transfer, but upon the transferee alone, and hence it is evident that this action, which seeks to make both liable, the one as much as the other, was not brought under that statute. The property transferred is not the subject of the action, but the conspiracy to defraud and the transfer pursuant thereto. The result of the action, if successful, would not affect the property, for the plaintiff could not take it nor sell it, nor do anything with it that he could not have done if the action had not been brought."

<sup>390</sup> Ward v. Petrie, 157 N. Y. 301, 68 Am. St. Rep. 790.

<sup>391</sup> Goddard v. Stiles, 90 N. Y. 199.

proceedings supplemental to execution.<sup>392</sup> Property exempt from execution is also exempt from the operation of supplemental proceedings.<sup>393</sup> Where a receiver is appointed, he is, no doubt, entitled to a conveyance from the defendant of all his real property subject to execution at law; and, without any formal transfer, becomes, by virtue of his appointment and qualification, vested with the title to all the defendant's personal estate subject to garnishment, or to direct levy and sale under execution. The defendant may be required to transfer to the receiver the title to property situate in another state.<sup>394</sup> The supreme court of New York for the fifth department has held that the present Code of Civil Procedure of that state has divested the courts of authority, in supplemental proceedings, to compel the debtor to transfer to the receiver lands situate in another state. The decision is placed upon the ground that that code provides for the vesting of property in

<sup>392</sup> *In re Milburn*, 59 Wis. 24; *Riddle and Bullard's Sup. Proc.* 279-290; *Reighart v. Harris*, 6 Kan. App. 339; *Reynolds v. Aetna L. I. Co.*, 6 App. Div. 254; *Serven v. Lowerre*, 23 N. Y. Supp. 1052; *Spencer v. Greene*, 17 R. I. 727; *Telles v. Lynde*, 47 Fed. Rep. 912. Speculative and uncertain contingent fees to which the defendant may become entitled in untried actions are not subject to supplemental proceedings. *Gibney v. Reilly*, 56 N. Y. Supp. 1055.

<sup>393</sup> *McKinney v. Snider*, 116 Ind. 160; *Hall v. Hartwell*, 142 Mass. 447; *Orme v. Kingsley*, 73 Minn. 143; *Bliss v. Raynor*, 91 Hun, 250; *Gray v. Ashley*, 53 N. Y. Supp. 547. The earnings of the defendant necessary for the support of his family, and due for services rendered within a specified time prior to the service of the notice, are usually exempt. *Bush v. White*, 12 Abb. Pr. 21; *Martin v. Sheridan*, 2 Hilt. 586; *Columbian Institute v. Cregan*, 11 Civ. Proc. R. 87; *Howell v. McDowell*, 47 N. J. L. 359. A cause of action arising from the destruction of exempt property is also exempt. *Andrews v. Rowan*, 28 How. Pr. 126.

<sup>394</sup> *Fenner v. Sanborn*, 37 Barb. 610; *Bunn v. Fonda*, 2 Code R. 70; *Bailey v. Ryder*, 10 N. Y. 363; *Newton v. Bronson*, 13 N. Y. 567; 67 Am. Dec. 89; *Spang v. Robinson*, 24 W. Va. 327; *Towne v. Campbell*, 35 Minn. 231.

the receiver from the time the order appointing him, or a certified copy thereof, is filed with the clerk of the county where the lands are situate; and that, as such filing cannot take place in another state, the condition on which the receiver's title can alone vest can never happen when the lands are not in the state where he was appointed.<sup>395</sup> The reasoning of the court does not seem irresistible. Prior to the enactment of the present code, the power to compel a conveyance of lands in another state was well established. The provisions relied upon as working a change in the pre-existing law were not apparently designed to interpose any limitation on the power of the court to compel the execution of an assignment or conveyance, but rather to prescribe rules for the government of cases wherein no conveyance is necessary. If the defendant has money or property in another state, he cannot be compelled to go there and get it and apply on the execution. The utmost which can be required of him is to execute an assignment to the sheriff or receiver.<sup>396</sup>

The receiver is entitled to an estate by curtesy held by the defendant,<sup>397</sup> and also to the defendant's right to have dower assigned,<sup>398</sup> and to moneys held for him by another,<sup>399</sup> and to net proceeds of partition sale belonging to him in the hands of a commissioner.<sup>400</sup> The word "property," as used in the statute authorizing supplemental proceedings, "is manifestly used in the broad sense of including every species of things in which there may be an ownership, and which may be made

<sup>395</sup> *Smith v. Tozer*, 42 Hun. 22; 11 Civ. Proc. Rep. 348.

<sup>396</sup> *Buchanan v. Hunt*, 98 N. Y. 500.

<sup>397</sup> *Beamish v. Hoyt*, 2 Robt. 307.

<sup>398</sup> *Moak v. Coates*, 33 Barb. 498; *Stewart v. McMartin*, 5 Barb. 438.

<sup>399</sup> *Hughes v. Oregonian Ry. Co.*, 11 Or. 158.

<sup>400</sup> *Sherman v. Carvill*, 73 Ind. 128.

available in the payment of judgments. Money may be levied upon under an ordinary execution, if turned out by the owner, but not if he keeps it in his pocket and refuses to surrender it. The proceeding supplemental to execution, in our judgment, was intended not only to discover property, but to reach money and other property which the judgment debtor refuses to apply in payment of the judgment, and which cannot be reached by an ordinary execution.”<sup>401</sup>

The chief difficulty in describing the scope of supplemental proceedings arises with reference to assets of an equitable character. In New York and California it is said that these proceedings can reach everything which could formerly have been made to contribute to the payment of judgments by the aid of creditors' bills.<sup>402</sup> The scope of these bills was unusually extensive in those states. They could reach choses in action arising from torts committed on the property of plaintiff,<sup>403</sup> all kinds of choses in action and equitable rights,<sup>404</sup> the interest of an heir prior to the distribution of his ancestor's estate,<sup>405</sup> and the interest of a partner in the assets of the firm.<sup>406</sup> A trust created by a defendant for his own benefit may be made available to his creditors by supplemental proceedings;<sup>407</sup> but it is

<sup>401</sup> *Baker v. State*, 109 Ind. 58, explaining *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661.

<sup>402</sup> *Adams v. Hackett*, 7 Cal. 201; *Lynch v. Johnson*, 48 N. Y. 33; *Drought v. Curtiss*, 8 How. Pr. 56.

<sup>403</sup> *Gillet v. Fairchild*, 4 Denio, 80; *Hudson v. Plets*, 11 Paige, 180; *Brouwer v. Hill*, 1 Sand. 649; *Riddle on Supplementary Proceedings*, 111, 112. But not a cause of action for slander, deceit, or other personal tort. *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551.

<sup>404</sup> *Edmeston v. Lyde*, 1 Paige, 637, 19 Am. Dec. 454.

<sup>405</sup> *McArthur v. Hoysradt*, 11 Paige, 495.

<sup>406</sup> *Eager v. Price*, 2 Paige, 333; *Webb v. Overmann*, 6 Abb. Pr. 92.

<sup>407</sup> *Watson v. Le Row*, 6 Barb. 481.

otherwise of his beneficial interest in a trust created for his benefit by some third person.<sup>408</sup> In Indiana the plaintiff may, by supplemental proceedings, set aside a fraudulent transfer,<sup>409</sup> or have the defendant's interest under a contract to purchase real estate sold.<sup>410</sup> The statutes of some of the states especially specify equitable interests as being subject to these proceedings.<sup>411</sup>

In order to support proceedings directed against equitable assets, it must be shown that the defendant has no accessible real nor personal estate, subject to execution at law, of sufficient value to satisfy the judgment.<sup>412</sup> These proceedings, like creditors' bills, may also be employed to reach property of which defendant has the legal title, but which, though subject to voluntary transfer, cannot be levied upon and sold under execution because of its intangible character. Hence, the rights of a judgment debtor in an invention conferred on him by letters patent,<sup>413</sup> or in a stock board or exchange,<sup>414</sup> resulting from his membership therein

<sup>408</sup> *Scott v. Nevius*, 6 Duer, 672; *Campbell v. Foster*, 16 How. Pr. 275; *Stewart v. Foster*, 1 Hilt. 505; *Campbell v. Foster*, 35 N. Y. 361; *Locke v. Mabbett*, 3 Abb. App. 68, 2 Keyes, 457; *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Linn v. Davis*, 58 N. J. L. 29; *Levey v. Bull*, 47 Hun, 350.

<sup>409</sup> *Burt v. Hoettinger*, 28 Ind. 214; *Witherow v. Higgins*, 13 Ind. 440; *Harris v. Howe*, 2 Ind. App. 419. This rule is, we believe, not recognized in the other states. *Flitts v. Beardsley*, 8 N. Y. Supp. 567; *Healey v. Butter*, 66 Wis. 9.

<sup>410</sup> *Figg v. Snook*, 9 Ind. 202.

<sup>411</sup> § 5464, Rev. Stat. Ohio; Code Iowa, 4079.

<sup>412</sup> *Lee v. Harcack*, 2 West. L. M. 527; *State Bank v. Oliver*, 1 Dian. 159; *Kiser v. Sawyer*, 4 Kan. 503. As to rule in North Carolina, see *McCaskill v. Lancashire*, 83 N. C. 393; *Rand v. Rand*, 78 N. C. 12.

<sup>413</sup> *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *Barnes v. Morgan*, 3 Hun, 703; *Gillett v. Bates*, 86 N. Y. 87; *Ex parte Keene*, 15 R. I. 294.

<sup>414</sup> *Sewell v. Ives*, 61 How. 54; *Ritterband v. Baggett*, 42 N. Y. Sup. Ct. 556; *Londheim v. White*, 67 How. 467; *Powell v. Waldron*,

and the valuable privileges resulting therefrom, may be reached by supplemental proceedings, in which he may be compelled to execute the necessary transfers to the receiver.

**§ 421. Power to Punish for Contempt.**—By the service of the original order to appear, the judge by whom it is made acquires jurisdiction over the party summoned to answer, and may thereafter punish any party or witness for disobedience to any order of the court.<sup>415</sup>

The right to thus punish is generally expressly conferred by the statutes authorizing these proceedings. These statutes have been assailed as unconstitutional on various grounds, as that they deprive persons of the benefit of trial by jury, and are summary in character, and, in effect, sanction imprisonment for the nonpayment of debt. If, however, it appears that a party proceeded against has the ability to comply with the order of the judge or court, his refusal or failure to do so is a defiance of its authority and necessarily a contempt. To compel obedience in such a case is not imprisonment for debt within the meaning of any constitutional prohibition inhibiting such imprisonment; nor is it a violation of the right to jury trial where the order enforced did not involve the determination of conflicting claims nor the collection of a debt, the existence of which was conceded.<sup>416</sup>

The exercise of the power to punish for contempt is generally regarded as discretionary in its nature.

89 N. Y. 328, 42 Am. Rep. 301; *Grocers' Bank v. Murphy*, 10 Daly, 168; *Habenicht v. Lissak*, 78 Cal. 357, 12 Am. St. Rep. 68.

<sup>415</sup> *Myers v. Janes*, 3 Abb. Pr. 301; *Wickes v. Dresser*, 4 Abb. Pr. 93, 13 How. Pr. 331; N. Y. Code Civ. Proc., § 2457.

<sup>416</sup> *Marriage v. Woodruff*, 77 Ia. 291; *Elkenberry v. Edwards*, 67 Ia. 619, 56 Am. Rep. 360; *In re Burrows*, 33 Kan. 675; *In re Knaup*, 144 Mo. 653, 66 Am. St. Rep. 435.

Hence, it has been held that an order of a judge refusing to punish a party for disobedience is not appealable.<sup>417</sup> The maintenance of this rule without exception would deprive judgment creditors of the benefit of these proceedings, except in those cases in which the court or judge having jurisdiction chose to concede it. Hence, we believe the better rule is, that if it clearly appears that such creditor was entitled to have enforced some order made by a judge or court competent to make it, the refusal to enforce it by punishment for contempt when necessary is an error which will be considered and corrected by the appellate courts.<sup>418</sup> A witness may be fined or imprisoned for refusing to answer proper questions.<sup>419</sup> A party may be adjudged guilty of a contempt, and punished therefor, if he fails to appear at the time originally appointed, or at an adjourned meeting,<sup>420</sup> or if he confesses a judgment,<sup>421</sup> or conveys or encumbers lands, whether situate in another state or not, for the purpose of rendering the proceedings against him less effectual. The judge will take notice of the nonappearance of a defendant or other party summoned, and will punish him therefor without requiring the matter to be brought to his attention by affidavit.<sup>422</sup> A party will be punished for not delivering property as required by the order of the

<sup>417</sup> *Joyce v. Holbrook*, 7 Abb. Pr. 338.

<sup>418</sup> *Livingston v. Swift*, 23 How. Pr. 1; *Holstein v. Rice*, 15 Abb. Pr. 307, 24 How. Pr. 135.

<sup>419</sup> *Clapp v. Lathrop*, 23 How. Pr. 423; *People v. Marston*, 18 Abb. Pr. 257; *Howe v. Welch*, 11 Civ. Proc. R. 444; *People v. Marston*, 18 Abb. Pr. 257; *Lathrop v. Clapp*, 40 N. Y. 328, 100 Am. Dec. 493.

<sup>420</sup> *Parker v. Hunt*, 15 Abb. Pr. 410, note; *Ross v. Olussman*, 3 Sand. 676; 1 Code R., N. S., 91; *Howe v. Welch*, 11 Civ. Proc. R. 444.

<sup>421</sup> *Fenner v. Sanborn*, 37 Barb. 610.

<sup>422</sup> *Miller v. Adams*, 52 N. Y. 409.



judge,<sup>423</sup> or for drawing money out of a bank and using it,<sup>424</sup> or for making any other disposition of his property to the prejudice of the plaintiff, and in disobedience to an existing injunctive order. It is not necessary for the order to have been actually entered or made. If there is a proceeding looking to the appointment of a receiver, as where a motion therefor has been heard and taken under advisement, and the debtor, contemplating that it will be made and for the purpose of avoiding its effect, makes a conveyance of his property, or does any other act, the purpose and result of which must be to make the order ineffective, he is as much guilty of contempt as if the order had already been made.<sup>425</sup> These proceedings sometimes are prosecuted in the court or before the judge having jurisdiction of the cause, sometimes before another judge designated by the statute, and sometimes before a referee appointed by the court or judge. Generally, a referee has no power to punish for contempt. If a party or witness is guilty of any disobedience of the order of court, such as refusal to appear or be examined as a witness, or any other act or neglect which may probably be regarded as a contempt, the power of the referee is restricted to reporting the supposed offense to the judge or court by whom he was appointed.<sup>426</sup> In Missouri the rule is otherwise, and the referee may commit a party or witness for contempt.<sup>427</sup> In the other states, the power to punish for a contempt seems to be

<sup>423</sup> *Bond v. Bond*, 69 N. C. 97; *Deposit Bank v. Wickham*, 44 How. Pr. 421; *In re Van Ness*, 47 N. Y. Supp. 702; *Marriage v. Woodruff*, 77 Ia. 291; *In re Burrows*, 33 Kan. 675; *In re Knaup*, 144 Mo. 653, 66 Am. St. Rep. 435.

<sup>424</sup> *People v. Kingsland*, 3 Abb. App. 526.

<sup>425</sup> *Ex parte Kellogg*, 64 Cal. 343.

<sup>426</sup> *Riddle and Bullard's Sup. Proc.* 212.

<sup>427</sup> *State v. Barclay*, 86 Mo. 55.

concurrent in the judge before whom the proceedings take place,<sup>428</sup> and in the court<sup>429</sup> wherein the judgment was rendered. If the judgment was rendered by a justice of the peace, supplemental proceedings may be prosecuted before him, and he may compel obedience to his lawful orders by committing the offender for contempt.<sup>430</sup> The fact that an order was irregularly or erroneously entered or served will not justify a party or witness in disobeying it. If he desires to take advantage of the irregularity, he must appear and move to vacate the order on that account. But while the order stands, he can disobey it only at his peril,<sup>431</sup> unless he can show that there was no jurisdiction to make it, and that it was therefore absolutely void.<sup>432</sup>

The constitutionality of statutes conferring power to punish as for a contempt and disobedience of the judge or court of orders in supplemental proceedings having been affirmed, the only question remaining for consideration is, to what extent is the finding of such court or judge conclusive respecting the ability of the party to obey the order, for, if it be conceded that there is a want of such ability, it must also be conceded that there is no contempt.<sup>433</sup> A mere profession of inability, though supported by the oath of the party pro-

<sup>428</sup> Riddle and Bullard's Sup. Proc. 207; *Bitting v. Vandenburg*, 17 How. Pr. 80.

<sup>429</sup> Riddle and Bullard's Sup. Proc. 211; *Nieuwankamp v. Ullman*, 47 Wis. 168.

<sup>430</sup> *Ex parte Latimer*, 47 Cal. 131.

<sup>431</sup> *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Schults v. Andrews*, 54 How. Pr. 378; *Erie Ry. Co. v. Ramsey*, 45 N. Y. 637; *Hilton v. Patterson*, 18 Abb. Pr. 245; *Newell v. Cutler*, 19 Hun, 74; *Billings v. Carver*, 54 Barb. 40.

<sup>432</sup> *Kennedy v. Weed*, 10 Abb. Pr. 62; *Smith v. Weeks*, 60 Wis. 94.

<sup>433</sup> *Walton v. Walton*, 54 N. J. Eq. 607; *Matter of Ockershausen*, 59 Hun, 200; *McCartan v. Van Syckel*, 10 Bosw. 694; *Myers v. Trimble*, 3 E. D. Smith, 607; *Ex parte Keene*, 15 R. I. 294.

ceeded against, cannot, however, be conclusive. Otherwise, the efficiency of these proceedings would depend too greatly on the truthfulness of the persons subject thereto. Ordinarily, orders adjudging persons to be guilty of contempt of court and inflicting punishment for such contempt are not appealable. The reverse of this is generally and perhaps universally true with respect to supplementary proceedings, particularly when punishment is for want of compliance with some order and it is claimed that such compliance was not within the power of the party sought to be punished, or that the order itself was not within the power of the court or judge making it.<sup>434</sup> With respect to reviewing evidence upon which the order was made, we have not found any decision applying any other rules than those applicable to other appellate proceedings, and in those it is well known that the finding of a subordinate court is rarely or never reviewed, except to the extent of ascertaining that there was some evidence to support it.

If a person whose imprisonment is directed seeks relief by habeas corpus, the inquiry must be restricted to the jurisdiction of the court or judge directing the imprisonment. It may be said that a court has no jurisdiction to punish him for noncompliance with an order with which he had not ability to comply, and this may be conceded. His want of ability is not conclusively established by his testimony, and, though it appears by the return to the writ that he whose imprisonment is claimed to be unauthorized has testified to his want of ability, he is not necessarily to be released, though no witness has been called to contradict him, for his manner when testifying and the attendant cir-

<sup>434</sup> McCullough v. Clark, 41 Cal. 298; Christensen v. Tostevin, 51 Minn. 230; Flnck v. Mannering, 46 Hun 323; Forbes v. Willard, 37 How. Pr. 193; Weaver v. Brydges, 85 Hun, 503.

cumstances, or either, may have satisfied the court that his denials were false. Upon a return to a writ of habeas corpus, it appeared that in a proceeding against a partnership one of its members had been brought before the court and had submitted to several partial and unsatisfactory examinations, after which the court made an order continuing the examination to a date specified and directing him to prepare a statement showing the amount of merchandise purchased by the firm during the year 1894, the purchase price thereof, the persons from whom purchased, and the amount paid thereon, together with a statement of the amount sold to a brother of the defendants, the price for which the sales were made, and the amount paid thereon, and a complete record of the transactions between the defendants and such brother during such year. At the time fixed, the party so directed appeared without the required statement, and insisted that he was unable to make it for want of necessary information, and, though admitting that he had a clerk and bookkeeper during such year and had kept books just prior thereto, he denied that either he or such bookkeeper had kept books during the time designated. He also claimed that he could neither read nor write, and had no knowledge of what had become of the goods. It, nevertheless, appeared that the firm had done an extensive business and received large invoices of goods during the year, of which but a small part had been accounted for. The court found that it was within the power of the defendant to comply with its order, and committed him for contempt until he should comply. The supreme court sustained this action when the defendant sought relief by habeas corpus.<sup>435</sup>

<sup>435</sup> In re Rosenberg, 90 Wis. 681. In this case, the court said: "The action was brought for the discovery of the goods of the debtor

**§ 422. Costs are Usually Allowed to the Prevailing Party in proceedings supplemental to execution, as in**

firm. The whole matter of enforcing the discovery was within the jurisdiction of the court. It was within its discretion to direct the manner in which the discovery should be made. It might require the petitioner to make discovery by the production of books and papers, by oral examination or by written statement, or by all these modes, as should appear to the court necessary and most feasible and conducive to the end in view. All this relates to practice, not to power; to form, rather than to substance. The substance of the proceeding was to obtain discovery. Error in mere form, if it exists, does not touch jurisdiction. To the end that the discovery should be complete and effectual, the court had power to require the petitioner to use all the means within his power for acquiring the information necessary to enable him to give the discovery called for. 1 *Pomeroy, Eq. Jur.* (2d ed.), § 204; 1 *Daniell, Ch. Prac.* (6th ed.), 724. And the court had no right to be deceived by untruthful statements, nor to be satisfied by evasive or prevaricating answers. Prevarication by a witness has the same effect upon the administration of justice as a refusal to answer. To the same effect it puts the witness in the position of standing out against the authority of the court, and thwarts the court in its effort and purpose of doing justice between the parties. It is contumacy. It is direct contempt of the authority of the court. *Berkson v. People*, 154 Ill. 81. Provision is made for the examination of the defendant in an action for discovery under section 3029, R. S., by section 3 of Circuit Court Rule XXVIII, relating to 'Creditors' Actions, Supplementary Proceedings, and Receivers.' It is provided that the defendant may be required to appear before a judge or court commissioner, to produce his books and papers, and to submit to such examination on oath as he shall direct, in relation to any matter which he may be legally required to disclose. Provision is also made by section 4096 for the examination of a party otherwise than as a witness at the trial. This section has been held to be a substitute for the bill of discovery under the former practice. *Frawley v. Cosgrove*, 83 Wis. 441. Under this statute a party is made a witness at the instance of the adversary party. The examination is subject to the same rules which apply to the examination of other witnesses. The scope is limited only to such papers as are relevant to the controversy. And answers may be enforced by contempt proceedings. Section 3477 provides that courts of record have power to punish any misconduct of persons summoned as witnesses, in refusing to be sworn or to answer questions as such witnesses. Section 2565 provides for punishing similar misconduct as for a criminal contempt. These statutes and rules seem, evidently, to make the petitioner's conduct in refusing to produce the books and papers of the firm, and to make

other cases.<sup>436</sup> Parties summoned to appear and answer are, when free from fault, entitled to their costs and disbursements.<sup>437</sup> The defendant, though notified to appear, can recover no costs when he is not examined.<sup>438</sup> Witness fees may be allowed.<sup>439</sup> The costs may be paid out of the funds in the hands of the re-

a truthful discovery under oath, without evasion or prevarication, a contempt of the court, and to provide for its punishment. But, if that were doubtful, the power to punish as for a contempt the refusal of a party to produce books and papers when so lawfully required, or to make discovery on oath of his property, without evasion or prevarication, is ample at the common law, without the aid of any statute. *State ex rel. Lanning v. Lonsdale*, 48 Wis. 348, 366; *People ex rel. Hackley v. Kelly*, 24 N. Y. 74; *Holman v. Mayor*, 34 Tex. 668; *State v. Matthews*, 37 N. H. 450; *Ex parte Robinson*, 19 Wall. 505; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 489; 3 Eng. & Am. Ency. of Law, 780, and cases cited in note 4. The substance of what was required of the petitioner was that he make truthful discovery of the property of the firm, in some form. After he had failed to produce the books and papers of the firm, and after oral examination had failed to elicit the truth, the court gave him still further time, and an opportunity to make discovery by a written statement to be verified by his oath. This, too, he failed to make. That the court was at all times ready to receive a truthful discovery, in whatever form, is evident from the whole course of the proceeding. But it was perseveringly thwarted by the evasion and prevarication of the petitioner. Whether the petitioner's answers were untruthful, evasive, or prevaricating, so as in effect to amount to a refusal to answer and give the discovery called for; or whether it was fairly within his ability to make the discovery required of him; whether his conduct was innocent or contumacious—were questions which the exigency of the case required the circuit court to determine. The power to determine is jurisdiction. The correctness or justice of the determination of these questions by the circuit court is not open for consideration here. That determination is conclusive in this proceeding. *State ex rel. Welch v. Sloan*, 65 Wis. 647; *People ex rel. Tweed v. Liscomb*, 60 N. Y. 571."

<sup>436</sup> §§ 2455, 2456, Code Civ. Proc. N. Y.

<sup>437</sup> *Anonymous*, 11 Abb. Pr. 108; 3 Sandf. 725; *Hulsaver v. Wiles*, 11 How. Pr. 446.

<sup>438</sup> *Engle v. Bonneau*, 2 Sand. 679; 3 Code R. 205.

<sup>439</sup> *Davis v. Turner*, 4 How. Pr. 190; *Muscott v. Runge*, 27 How. Pr. 85.

ceiver,<sup>440</sup> or out of moneys due to the defendant and in the possession of the person summoned to answer.<sup>441</sup> If a receiver prosecutes a suit, the creditors are not responsible for the costs, unless it was instituted or carried on at their request.<sup>442</sup>

§ 423. **Payment to Sheriff having Execution.**—Many of the statutes concerning proceedings supplemental to execution contain a provision under which the person summoned as garnishee is authorized to pay to the officer charged with the service of the execution any moneys due to the judgment debtor.<sup>443</sup> By the present code of New York, the payment must be made under an order of the judge, and, when so made, “is to the extent thereof a discharge of the indebtedness, except against the transferee, from the judgment debtor, in good faith, and for a valuable consideration, of whose rights the person or corporation had actual or constructive notice when the payment was made.”<sup>444</sup> Where statutory provisions of this nature are in force, there cannot be any doubt that a payment made to the sheriff will be a discharge of a debtor as to the amount which is so paid, provided that at the time of payment the person paying is still the debtor of the judgment debtor.<sup>445</sup> But it is evident that the courts look upon

<sup>440</sup> *Webber v. Hobble*, 13 How. Pr. 382.

<sup>441</sup> *Kearney's Case*, 13 Abb. Pr. 459; 22 How. Pr. 309.

<sup>442</sup> *Cutter v. Relly*, 31 How. Pr. 472; *Wheeler v. Wright*, 23 How. Pr. 228. For cases concerning costs under trustee process, see *Bell v. Glazier*, 13 N. H. 134; *Hills v. Smith*, 28 N. H. 369; *Hall v. Knapp*, 1 Pa. St. 213.

<sup>443</sup> § 2446, Code N. Y.; Cal. Code Civ. Proc., § 716; Ohio Rev. Stats., § 5482; S. & B. Stats. of Wisconsin, § 3028; Rev. Stats. Nev., § 3264; Code Civ. Proc. S. C., § 313.

<sup>444</sup> Code Civ. Proc. N. Y., § 2446.

<sup>445</sup> *Hallanan v. Crow*, 15 Ohio St. 176; *Davis v. Staples*, 45 Mo. 567; *Fibbee v. Howard*, 7 Wis. 150; *Judd v. Littlejohn*, 11 Wis. 176; *Dunbar v. Harnesberger*, 12 Wis. 373.

this statutory provision with disfavor, and are inclined to give it a strict, rather than a liberal, interpretation. In one case it was held that, as this statute was in derogation of the common law, "the word 'person' would not be held to include persons," and, hence, that while a "person" owing a debt could lawfully make payment thereof to the sheriff, yet if the debt was owing from two or more persons, they could not make such payment.<sup>446</sup> Where a payment made under this statute is relied upon as a defense to an execution, it must be specially pleaded by the defendant,<sup>447</sup> and he must, at the trial, make legal proof of the existence of the judgment under which the payment was made.<sup>448</sup> These statutory provisions apply to debts only. Hence, one who is liable to a judgment debtor for a tort committed cannot discharge such liability by payment to the sheriff.<sup>449</sup> If, however, the liability for a tort has been merged into a judgment, it is henceforth to be treated as a debt.<sup>450</sup> The code of New York now, after authorizing the payment to be made when ordered by the judge, protects the garnishee from assignments of which he had no notice. Where the statute does not contain provisions protecting him against such assignments, it is always dangerous for a debtor to make payment to a sheriff; for, in order to obtain the benefit of such payment, it is incumbent on him to show that all the circumstances contemplated by a strict construction of the statute were still in existence at the moment the payment was made. Thus, it may happen that, without the knowledge of the debtor, the debt

<sup>446</sup> *Howey v. Miller*, 67 N. C. 450.

<sup>447</sup> *Calkins v. Packer*, 21 Barb. 275.

<sup>448</sup> *Handley v. Greene*, 15 Barb. 601.

<sup>449</sup> *Davenport v. Ludlow*, 4 How. Pr. 337.

<sup>450</sup> *Mallory v. Norton*, 21 Barb. 424.



due from him to the judgment debtor has been assigned. In such an event, the payment to the sheriff is no defense to an action brought by the assignee.<sup>451</sup>

The reasoning by which the decisions establishing this rule of law are sustained is best stated in the opinion of the court in the case of *Robinson v. Weeks*.<sup>452</sup> In that case, an assignee, having sued upon a debt, the defendant pleaded payment made to the sheriff before notice of the assignment. The court said: "The difficulty in the way of the defendant is, that, at the time of making these payments to the sheriff, he was not in fact indebted to the judgment debtor, whose debts he volunteered to pay. The nominal plaintiff here had at that time no debt or demand against the defendant which he could enforce at law or in equity. It will hardly answer, I think, to say that, as he received no notice of the assignment, he had a right to regard himself as the debtor of the plaintiff, and is therefore to be protected. The code, it is true, authorizes a debtor of the judgment debtor to pay the amount of his debt upon any execution against the latter in the sheriff's hands, but it does not make it his duty to do so. It imposes no obligation on him whatever; and, if a party indebted, instead of paying his debt to the person to whom he supposes himself indebted, and where he might learn the true state of the matter, chooses to go and pay another debt—which the law does not require him to pay, and to a person who has no opportunity of knowing whether or not he is really the debtor of the person whose debt he undertakes thus to satisfy—

<sup>451</sup> *Freeman on Judgments*, § 426; *Brown v. Ayres*, 33 Cal. 525, 91 Am. Dec. 655; *Countryman v. Boyer*, 3 How. Pr. 386; 2 Code R. 64; *Richardson v. Ainsworth*, 20 How. Pr. 521. Contra, *Drumm v. Sherman*, 20 La. Ann. 96.

<sup>452</sup> 6 How. Pr. 161; 1 Code R., N. S., 314.

I think he does it at his peril. He must see to it that he pays his creditor's debt, or the law will not protect him. He should be regarded as a volunteer, taking the risk of paying the right debt. Had the defendant paid the nominal plaintiff the amount of the judgment, and taken his discharge, without notice of the assignment, he would, without doubt, have been protected. Such payment and discharge would have been good against the assignee omitting to give notice of his rights. But the assignee, in that case, would have had his remedy against such nominal plaintiff by an action for a breach of the implied conditions of the assignment. Here, however, the party assigning has done nothing in violation of the assignment."

**§ 423 a. Effect of Orders as Res Judicata.**—The orders made in supplementary proceedings involve the determination of issues of fact and the application thereto of rules of law; and, as they settle the rights of the parties before the court, they must be given the effect of res judicata in all subsequent proceedings between those parties and others in privity with them.<sup>453</sup> Hence, if by such orders money is adjudged to be paid or property to be delivered, they establish the right of the one party to such payment or delivery, and the duty of the other to make it.

The parties before the court are the judgment debtor, the judgment creditor, and the persons cited to appear or voluntarily appearing. All these are bound by the order or judgment of the court or judge, because they are parties thereto and entitled as such to seek redress by some revisory proceeding if the order is erroneous. Others whose rights were acquired prior to the com-

<sup>453</sup> McCullough v. Clark, 41 Cal. 298; Root & Co. v. Davis, 51 Ohio St. 29; Providence S. I. v. Barr, 17 R. I. 131.

mencement of the supplementary proceedings are not affected by any order therein.<sup>454</sup> To this rule one exception exists. A person required to submit to an examination must necessarily be protected in whatsoever disclosures he may make, provided it be truthful and not accompanied and influenced by negligence. If he honestly believes that he has the property of the defendant in his possession, or that he is indebted to the defendant, he must so answer, and the result must follow that the court or judge will order him to deliver such property or to pay such debt, or so much thereof as may be necessary to satisfy the judgment. Without his knowledge, the debt may have been assigned or the property transferred to another who is not a party to, and has no notice of, the proceedings. The latter, if the order is complied with in ignorance of his rights, is precluded from asserting them as against the innocent garnishee.<sup>455</sup>

There are other instances in which the judgment debtor is not bound by the order, as where he was ignorant of the proceedings or otherwise had no opportunity to protect himself against them, or was under no duty to appear and resist them, and it is shown that the order was not proper to be entered. The only instance of which we are aware is presented when the debt or property is not subject to execution. If a third person summoned in supplementary proceedings knows of any reason why he should not be required to pay the debt or deliver the property, he ought to disclose it, or, at least, to give the judgment debtor an opportunity to do so, and, therefore, if such third person is directed to deliver property or to pay a debt which is

<sup>454</sup> Osborne v. Reardon, 79 Ia. 175.

<sup>455</sup> Ante, § 171.

exempt from execution, it is probable that the order does not protect him in his obedience thereto if he was charged with knowledge of the exemption, and neither called it to the attention of the court or judge, nor informed the judgment debtor of the proceeding, so that the latter might appear therein for the protection of his interests.<sup>456</sup>

Whenever an order ought not to be enforced because it prejudicially affects some person who, without his fault, was not heard before it was granted, relief therefrom may be sought in the court wherein it was granted, and doubtless may be interposed in any action based thereon. Hence, an order may be vacated whenever it appears that a third person claims the property directed to be delivered or that it is exempt from execution, and the claim of exemption, without the fault of the claimant, was not presented for consideration before the order was made.<sup>457</sup>

<sup>456</sup> *Missouri P. R. R. Co. v. Sharitt*, 43 Kan. 375, 19 Am. St. Rep. 143; *Missouri P. R. R. Co. v. Whipsker*, 77 Tex. 14, 19 Am. St. Rep. 734.

<sup>457</sup> *Serven v. Lowerre*, 23 N. Y. Supp. 1052.

## CHAPTER XXX.

PROCEEDINGS IN EQUITY IN AID OF EXECUTION  
AND TO REACH EQUITABLE ASSETS.

- § 424. Purposes accomplished and the relief obtainable by.
- § 424a. The time within which a creditor's suit may be commenced.
- § 425. What property may be subjected to.
- § 426. Cannot be maintained where legal remedy exists.
- § 427. On what judgments they may be sustained.
- § 428. Creditor's bill must generally be supported by an execution returned nulla bona.
- § 429. Whether the insolvency of the defendant forms an exception to the rule.
- § 430. What must be done after judgment to authorize a suit in aid of execution.
- § 431. Assignees may prosecute.
- § 432. Joinder of parties plaintiff, and the rights of creditors not joined.
- § 433. Parties defendant.
- § 434. Of the lien arising from proceedings in equity.

§ 424. Purposes Accomplished and the Relief Obtainable by.—The objects which may be accomplished by proceedings in equity to obtain satisfaction of a judgment at law are three: 1. A full and complete discovery may be obtained of all the defendant's assets, and, when discovered, they may be compelled to contribute to the payment of the plaintiff's judgment;<sup>1</sup> 2. Equitable and various other assets, not subject to levy and

<sup>1</sup> Cresswell v. Smith, 8 Lea. 688; Carter v. Hampton, 77 Va. 631; Thomas v. Adams, 30 Ill. 37; Clarke v. Webb, 2 Hen. & M. 8; Gordon v. Lowell, 21 Me. 251; Lore v. Getsinger, 3 Halst. Ch. 191; Miers v. Z. & M. T. Co., 11 Ohio, 273; Cadwallader v. G. & A. Society, 11 Ohio, 292; Goss v. Lester, 1 Wis. 51; Hacker v. Robeson, 8 R. I. 141; Hendricks v. Robinson, 2 Johns. Ch. 283; Kimberly v. Sells, 3 Johns. Ch. 467; Boden v. Dellow, 1 Atk. 289; Le Roy v. Rogers, 3 Paige, 234.

sale at law, may be sold under the direction of chancery, and the proceeds applied to the payment of the plaintiff's debt;<sup>2</sup> 3. Various obstructions may be removed from property liable to seizure and sale at law, and, by their removal, the plaintiff's legal remedy may be made far more certain and efficient than it would otherwise be;<sup>3</sup> 4. The complainant may, in effect, assert for his benefit a cause of action existing in favor of the judgment debtor, and which the latter neglects or refuses to assert.

The right to maintain a creditor's suit is to some extent affected in all, or nearly all, of the states by statutes giving to courts of law jurisdiction more ample than that possessed by them at the common law, and, in some instances, conferring upon them, or upon other judicial tribunals, jurisdiction formerly exercised by courts of equity. Thus, we have already shown that in some of the states the statutes authorizing proceedings supplementary to execution have been held to exclude the right to prosecute creditor's suits when the proceeding at law is adequate. The administration of the estates of decedents has, in many of the states, been delegated to probate and surrogate courts, and, while this has not wholly divested chancery of its jurisdiction, it will not be exercised when an estate is being administered in another court of competent jurisdiction, and the remedies which it is authorized to confer are ample.

<sup>2</sup> *Robert v. Hodges*, 16 N. J. Eq. 299; *Harris v. Alcock*, 10 Gill & J. 226, 32 Am. Dec. 158; *Dorsey v. Dorsey*, 10 Md. 471; *Le Roy v. Rogers*, 3 Falge, 234; *Platt v. St. Clair*, 6 Ohio, 227; *Wallace v. Smith*, 2 Handy, 78; *Williams v. Hubbard*, 1 Walk. Ch. 28; *Dargan v. Waring*, 11 Ala. 988, 46 Am. Dec. 234; *Heath v. Bishop*, 4 Rich. Eq. 46, 55 Am. Dec. 654; *Sparhawk v. Cloon*, 125 Mass. 266; *Kirby v. Bruns*, 45 Mo. 234, 100 Am. Dec. 376.

<sup>3</sup> *Folkes v. Hayden*, 29 Miss. 123; *Dargan v. Waring*, 11 Ala. 988, 46 Am. Dec. 234; *Holt v. Bancroft*, 30 Ala. 193.

Hence, though a creditor has exhausted his remedy at law, the subsequent death of his debtor will not entitle him to maintain a creditors' bill against the latter's administrator to reach personal assets in his custody and which it is his duty to administer and dispose of under the supervision of the court appointing him, and while there is nothing to indicate that he will not faithfully discharge this duty.<sup>4</sup>

Courts are not agreed with respect to the extent to which creditors' suits are supplanted by statutes authorizing proceedings supplementary to execution.<sup>5</sup> Whenever, however, a new remedy is created by statute and is claimed to have superseded that by creditors' suit, it may be safely assumed that this latter remedy may still be pursued if the new remedy has, although fully pursued, proved unavailing, or, though not resorted to, it is manifestly inadequate under the circumstances disclosed by the bill.<sup>6</sup>

The remedy given by supplementary proceedings of compelling the debtor to appear and submit to an examination respecting his property subject to execution, and of also calling and examining witnesses concerning the same matter, must render creditors' bills solely for the purpose of discovering assets unnecessary and probably not maintainable without showing that the remedy at law is inadequate.<sup>7</sup> Yet even for the purposes of discovery creditors' suits are not wholly obsolete.<sup>8</sup> It is true that bills for discovery

<sup>4</sup> Winslow v. Leland, 128 Ill. 304.

<sup>5</sup> Feldenheimer v. Tressel, 6 Dak. 265; Vansickle v. Shenk, 150 Ind. 431; Ryan v. Maxey, 14 Mont. 81; Enright v. Geant, 5 Utah, 834; ante, § 194.

<sup>6</sup> Pierstoff v. Jorge, 86 Wis. 128, 39 Am. St. Rep. 881.

<sup>7</sup> Cargill v. Kountze, 86 Tex. 386, 40 Am. St. Rep. 853; ante, § 394.

<sup>8</sup> Schwelter v. Brown, 59 Ill. App. 24; Trego v. Skinner, 42 Md. 421; South Bend T. M. Co. v. Pierre etc. Co., 4 S. D. 173.

wholly unconnected with allegations relating to specific property are, and have always been, rare. It is more usual to suggest that the judgment-debtor has some interest in property specified, and that such interest does not appear by the record or by any muniment of title, or that the title, though standing in the name of another, is held in trust for such debtor, or to disclose some other circumstance from which it is apparent that the remedy at law is wholly inapplicable, or so seriously embarrassed that the complainants ought not to be required to proceed there until the nature and extent of the debtor's interest can be established. All persons whose presence is essential to the determination of the questions suggested may be made parties defendant, and the actual title and interest of the judgment debtor be thus discovered, and the court, thus having rightfully acquired jurisdiction, may make such order or decree as may be requisite to do complete justice between the parties before it, so that it shall not be necessary for them to resort to any other suit or action.<sup>9</sup> In one state, it has been held that a creditors' bill cannot be sustained against a judgment debtor and his grantor on the allegation that a conveyance from the latter to the former has been lost and the record thereof destroyed by fire, on the ground that the remedy of the creditor at law is ample.<sup>10</sup> Surely, the loss of the conveyance and the destruction of its record must seriously embarrass the judgment debtor and diminish the certainty and efficiency of his remedy at law, and we hence think that the bill should have been sustained.

<sup>9</sup> O'Connell v. Taney, 16 Colo. 353, 25 Am. St. Rep. 275; McCormick H. Co. v. Gates, 75 Ia. 343; Macauley v. Smith, 182 N. Y. 524; Everett v. Raby, 104 N. C. 479, 10 Am. St. Rep. 526.

<sup>10</sup> Coogler v. Mayo, 21 Fla. 136.



The necessity of resorting to creditors' suits for the purpose of reaching assets not subject to levy and sale at law has also been greatly diminished both by statutes subjecting to execution at law many classes of property which formerly could be reached only in equity, and by affording a remedy by supplementary proceedings and the appointment of receivers therein adequate to subject to the satisfaction of the judgment property which even now can neither be seized nor sold under execution.

Under the third subdivision falls that numerous class of cases in which property has been made the subject of liens and transfers made to defraud creditors. In such a case, the creditors may proceed to levy and sell as if no such lien or transfer existed.<sup>11</sup> Their remedy at law is nevertheless seriously obstructed, because few persons can be found willing to purchase property at execution sales, and take upon themselves the burden and the risk of contesting with adverse claimants. A creditor is therefore allowed to go into equity to test the validity of claims which interfere with his rights, and which he believes to be founded in fraud. Upon a proper showing, equity will remove a fraudulent transfer,<sup>12</sup> or mortgage,<sup>13</sup> or judgment,<sup>14</sup> or other lien, or

<sup>11</sup> Ante, § 136.

<sup>12</sup> *Watts v. Gayle*, 20 Ala. 817; *Lathrop v. McBurney*, 71 Ga. 815; *Moffat v. Ingham*, 7 Dana, 495; *Abbey v. Com. Bank*, 31 Miss. 434; *Pettet v. Shepherd*, 5 Paige, 493; *Sheafe v. Sheafe*, 40 N. H. 516; *August v. Seeskind*, 8 Cold. 166; *Fay v. Jones*, 1 Head, 442; *Gates v. Boomer*, 17 Wis. 455; *Heye v. Bolles*, 2 Daly, 231, 33 How. Pr. 266; *Metcalf v. Arnold*, 110 Ala. 180, 55 Am. St. Rep. 24; *State v. Parsons*, 147 Ind. 579, 62 Am. St. Rep. 430; *Brundage v. Chenoworth*, 101 Ia. 256, 63 Am. St. Rep. 382; *Gibbons v. Pemberton*, 101 Mich. 397, 45 Am. St. Rep. 417; *Vicksburg etc. R. R. Co. v. Phillips*, 64 Miss. 108; *Pierstoff v. Jorges*, 86 Wis. 128, 39 Am. St. Rep. 881.

<sup>13</sup> *Merchants' N. B. v. Hogle*, 25 Ill. App. 543; *Hedges v. Polhemus*, 30 N. Y. Supp. 536; *Stowell v. Haslitt*, 5 Lans. 380.

<sup>14</sup> *Wickersham v. Comerford*, 96 Cal. 433; *Shaw v. Dwight*, 27 N. Y. 244, 84 Am. Dec. 275.

clear away a cloud from the title.<sup>15</sup> Nor can a creditor's right be barred by judicial proceedings fraudulently conceived and conducted. If such proceedings have resulted in a sale, he may, by a creditor's bill, procure its vacation. In proceeding upon such bill the court will not revise the judgment of the court in which the sale took place, nor undertake to correct errors or irregularities therein, "but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage they have derived under it."<sup>16</sup>

Although fraud is a more frequent ground for the removal of obstructions than any other, it is not an indispensable ground. Any other recognized ground of equitable interference will entitle the judgment debtor to relief. Hence a legal impediment due to mistake may be removed to the same extent as if founded on fraud.<sup>17</sup>

The mere fact that there is an apparent obstruction calculated "to inspire doubt and apprehension in the mind of purchasers, and thus prevent them from bidding upon the property," is generally sufficient to warrant equity in decreeing its removal.<sup>18</sup> This broad statement of the rule has been challenged by the supreme court of Minnesota. In that state, a judgment debtor, after the lien of the judgment had attached to real property standing in his name, executed a conveyance thereof, in which he recited that the title had always been held by him in trust for the grantee, and

<sup>15</sup> *Saltmarsh v. Smith*, 32 Ala. 404; *Myers v. Hewett*, 16 Ohio, 449; *Ahlhouser v. Doud*, 74 Wis. 400.

<sup>16</sup> *Johnson v. Waters*, 111 U. S. 667.

<sup>17</sup> *Trusdell v. Lehman*, 47 N. J. Eq. 218.

<sup>18</sup> *Tuck v. Olds*, 29 Fed. Rep. 738; *Myers v. Hewett*, 16 Ohio, 449.

that the conveyance was made pursuant to such trust. This statement, standing thus upon the public records, must have operated to prevent any sale of the property under execution to any person other than the judgment debtor, and hence substantially obstructed his legal remedy. It was, however, by the court compared to a statement made upon the street or in the columns of a public newspaper, against which it was said that the creditor could obtain no relief in equity.<sup>19</sup> In this, we doubt not the court erred. In a later decision in the same state, relief was granted by creditors' suit against a statutory foreclosure of a mortgage on the ground that the notice requisite to authorize the sale had not been given, and it was said that such foreclosure and the conveyance based thereon, though invalid, constituted an obstruction to the sale of the property against which the creditor was entitled to be relieved.<sup>20</sup> Of course, the obstruction must be one which the debtor or other person creating it had no right to interpose. It is not sufficient that he had the power to prevent it. Thus, if one sued had a complete defense to the action, based on the statute of limitations, he had also the right to waive this defense, and if he did so and permitted a judgment to be taken against him, his other creditors are not entitled to be relieved from its operation.<sup>21</sup>

A familiar instance of a creditor's bill to compel the assertion, for the benefit of the complainant, of a cause of action existing in favor of the judgment debtor, is a suit to compel a corporation defendant to call for, and

<sup>19</sup> *Cornman v. Sidle*, 65 Minn. 84.

<sup>20</sup> *Swain v. Lynd* (Minn.), 76 N. W. 958.

<sup>21</sup> *McMannomy v. Chicago etc. R. Co.*, 167 Ill. 497; *Allen v. Smith*, 129 U. S. 465.

its stockholders to pay, amounts remaining unpaid on their subscriptions to its capital stock,<sup>22</sup> or to compel persons who have misappropriated the funds of an insolvent corporation to repay such funds, or so much thereof as are required to discharge the demands of the complainants against such corporation.<sup>23</sup>

A bill may be filed for two or more of the objects hereinbefore specified, as where it is to aid an execution and also to reach property not subject to execution.<sup>24</sup> It may be that the objects sought by a creditor's bill cannot be secured without restraining the defendants from making transfers, or injuring the property, or from doing some other act tending to render the final decree ineffective. Whatever may be requisite to prevent the plaintiff's suit from proving abortive will generally be done, provided it is not beyond the relief which equity is competent to extend. To discuss what relief may be granted to creditors' suits will be equivalent to a general consideration of the remedial powers of courts of equity, for when a court of equity obtains jurisdiction of a cause, it proceeds to do complete justice and to administer full relief. This rule is not less applicable to creditors' than to other suits.<sup>25</sup> It has been said that in a suit by a

<sup>22</sup> *Germantown Passenger Ry. Co. v. Fidler*, 60 Pa. St. 124, 100 Am. Dec. 546, and note 551-557; *Briggs v. Penniman*, 8 Cow. 387, 18 Am. Dec. 454; *Harmon v. Page*, 62 Cal. 448; *Hatch v. Dana*, 101 U. S. 205; *Pickering v. Townsend*, 118 Ala. 351; *Tunesina v. Schutler*, 114 Ill. 156; *Thompson v. Reno S. B.*, 19 Nev. 242, 3 Am. St. Rep. 883; *Ballin v. Loeb*, 78 Wis. 404; *McKusick v. Seymour*, 48 Minn. 172; *Lane's Appeal*, 105 Pa. St. 40, 51 Am. Rep. 166.

<sup>23</sup> *Reed v. Goldstein*, 53 Cal. 296.

<sup>24</sup> *Beam v. Bennett*, 51 Mich. 148.

<sup>25</sup> *Great W. T. Co. v. Gray*, 122 Ill. 196; *Bank of Commerce v. Chambers*, 96 Mo. 450; *Thompson v. Reno S. B.*, 19 Nev. 242, 3 Am. St. Rep. 883; *Stokes v. Amerman*, 121 N. Y. 337; *Lewis v. Glenn*, 84 Va. 947; *Hawkins v. Glenn*, 131 U. S. 819.

single creditor for relief against a fraudulent transfer, the court will merely set it aside and direct complainants to proceed by taking out execution and levying upon and selling property thereunder.<sup>26</sup> Doubtless this course may be adopted. Generally, however, full relief will be granted in a creditor's suit by directing therein a sale of the property, or so much thereof as may be necessary to satisfy the demands of the complainant. The only limitation upon the power of the court is, that it shall not proceed farther than is necessary for the protection of the rights and equities of the parties before it. Hence, before ordering a sale of any property, it should determine what those rights and equities are, and direct a sale so far only as may be necessary to satisfy them, and should also require the disposition of the proceeds of the sale in accordance with such equities.<sup>27</sup>

Very frequently the property sought to be reached by the bill is taken into the possession of the court, and a receiver appointed for its protection and management.<sup>28</sup> Usually there is great danger that the property sought to be reached by the bill will be trans-

<sup>26</sup> *Bryer v. Foerster*, 43 N. Y. Supp. 801.

<sup>27</sup> *Davis v. White*, 49 N. J. Eq. 567; *Nadal v. Britton*, 112 N. C. 180; *Wagener v. Mars*, 27 S. C. 107, 13 Am. St. Rep. 628; *Strayer v. Long*, 83 Va. 715; *Moore v. Bruce*, 85 Va. 139; *Love v. Tinsley*, 32 W. Va. 25; *McCleary v. Grantham*, 29 W. Va. 301; *Martin v. Warner*, 34 W. Va. 182.

<sup>28</sup> *Badger v. Sutton*, 52 N. Y. Supp. 16; *Fuller v. Taylor*, 6 N. J. Eq. 301; *Crippen v. Hudson*, 13 N. Y. 161; *Payne v. Sheldon*, 63 Barb. 169; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *Bloodgood v. Clark*, 4 Paige, 574; *Curling v. Marquis of Townsend*, 19 Ves. 628; *Lent v. McQueen*, 15 How. Pr. 313; 5 Wait's Pr. 642, 643; *Osborn v. Heyer*, 2 Paige, 342; *Fitzhugh v. Everingham*, 6 Paige, 29; *Bank v. Schermerhorn*, Clarke Ch. 214. The appointment, title, powers, and duties of receivers appointed in proceedings instituted by judgment creditors are adequately discussed in chapter 12, sections 399-471, of *High on Receivers*.

ferred by the defendant to some third person, or will, by some other means, be placed in a situation where it will be either difficult or impossible to make it answerable to the decree which may ultimately be entered in the case. Hence it is usual, at or very soon after the filing of the bill, to obtain an injunction to prevent the defendant from making any disposition of his property which would tend to make the suit ineffectual.<sup>29</sup> While the necessity of an injunction against a transfer of the defendant's property may be more frequent and obvious than any other, yet this is by no means the only occasion for the use of this preventive relief in connection with creditors' suits. Whatever may be the wrong threatened, if it be of such a character that its perpetration will render the suit wholly or partly ineffectual, as in case of the removal or destruction of the property, an injunction will issue.<sup>30</sup> If a fraudulent obstruction has been interposed to hinder or delay the plaintiff at law, he sometimes does not ask equity to do anything beyond removing such obstruction, for when it is removed the plaintiff may safely proceed at law under his execution. But the more usual practice, both in proceedings to remove fraudulent obstructions and in proceedings to reach property not subject to execution at law, is to obtain the appointment of a receiver, and thereby bring the property within the custody and control of the court.<sup>31</sup> If the property consists of real estate, the defendants are, in some of

<sup>29</sup> *Candler v. Pettit*, 1 Paige, 168; *Bloodgood v. Clark*, 4 Paige, 574; *Austin v. Figueira*, 7 Paige, 56; 5 Wait's Pr. 652; 1 Barb. Ch. 659.

<sup>30</sup> *Witmer's Appeal*, 45 Pa. St. 455, 84 Am. Dec. 505; *Fowler's Appeal*, 87 Pa. St. 449; *Tessler v. Wyse*, 3 Bland, 29; *New v. Bame*, 10 Paige, 502.

<sup>31</sup> *Crippen v. Hudson*, 13 N. Y. 161; *Payne v. Sheldon*, 63 Barb. 169; 5 Wait's Pr. 651.

the states, required to execute a conveyance to the receiver. If it consists of personalty, the title vests in him by virtue of his appointment. After he has been vested with the title, the receiver collects, manages, and disposes of the property as directed by the orders and decrees of the court; and the plaintiff, when entitled thereto, obtains satisfaction out of the funds realized by the receiver.

**§ 424 a. The Time Within Which a Creditors' Suit may be Commenced** must be determined by considering the statutes of limitation of the several states. As in other cases, these statutes do not begin to run until the party against whom they are urged has a cause of action enforceable by suit. The right to maintain suit is, in most cases, dependent on the recovery of judgment, and the return of an execution thereon unsatisfied. The time of such recovery and return may have been influenced by the inaction of the plaintiff. He may have chosen not to assert his original cause of action until the latest date fixed by the statute, or he may even have sued at a later date and been permitted to recover judgment through the failure of his debtor to interpose the statute of limitations. In the meantime, such debtor may have executed a fraudulent transfer and delivered possession to his grantee, who may have held thereafter adversely to all persons. Nevertheless, as against a creditors' suit brought against him, the statute does not run for his protection from the date of his conveyance, nor from the date of his taking possession thereunder, but only from the time when it first became possible for the judgment creditor to maintain his suit to assail such transfer,

which, as already suggested, is ordinarily not until the recovery of his judgment.<sup>32</sup>

§ 425. **The Property, Which by a Creditor's Bill, or by a bill in aid of execution, may be reached and forced to contribute to the satisfaction of a judgment, no doubt embraces everything which can be the subject of levy and sale at law.** Generally, in the case of personal property fraudulently transferred, the remedy by direct levy and sale is more speedy and efficient than by creditors' suit, but there is no doubt that such a suit may be maintained to reach personal property as well as real.<sup>33</sup> We have already shown that the creditors' suit is a well known and favorite mode of subjecting to the payment of a judgment property which has been transferred in fraud of creditors. The character of the property is immaterial, provided, that but for the transfer, it is such that it might be levied upon and sold under execution against the grantor.<sup>34</sup> If it has been by the fraudulent grantee exchanged for other property, or so intermingled with his property that it cannot be separated therefrom, or has been lost, he may be compelled to account for its proceeds or value, not exceeding the extent necessary to satisfy the judgment against his grantor.<sup>35</sup>

<sup>32</sup> *Ohm v. Superior Court*, 85 Cal. 545, 20 Am. St. Rep. 245; *Brown v. Campbell*, 100 Cal. 635; 38 Am. St. Rep. 314; *McMannomy v. Chicago etc. R. Co.*, 167 Ill. 497; *White v. Keady*, 168 Ill. 76; *Brundage v. Cheneworth*, 101 Ia. 256, 63 Am. St. Rep. 382; *Gates v. Andrews*, 37 N. Y. 657, 97 Am. Dec. 764; *Weaver v. Haviland*, 142 N. Y. 534, 40 Am. St. Rep. 631.

<sup>33</sup> *O'Brien v. Stambach*, 101 Ia. 40, 63 Am. St. Rep. 368; *Webb v. Staves*, 37 N. Y. Supp. 414; *Pierstoff v. Jorges*, 86 Wis. 128, 39 Am. St. Rep. 881.

<sup>34</sup> *Ladd v. Smith*, 107 Ala. 506; *Rapp v. Whittier*, 113 Cal. 429; *Mershon v. Hulse*, 25 Ill. App. 292; *Decker v. Decker*, 108 N. Y. 128; ante, § 424.

<sup>35</sup> *Phillips v. Smith*, 116 Ind. 399; *Hulley v. Ohedlc*, 22 Nev. 127,



The difficulty is in determining what property, not subject to execution at law, may be made liable in equity. It will be remembered that equitable estates were not subject to execution at law. Such an estate may be reached by a creditor's bill, when the property is such that it could be subjected to execution at law, if the debtor's interest therein were legal instead of equitable.<sup>36</sup> Hence, by such a bill the complainant may obtain the benefit of property paid for by the debtor, and which he has caused to be conveyed to his wife or some other person, either as a gift, or to hold as trustee for the debtor,<sup>37</sup> or of improvements placed by the debtor upon the lands of his wife or child,<sup>38</sup> or of property of the wife of the debtor to which the latter is entitled by virtue of his marital rights.<sup>39</sup>

Property may sometimes be so limited by an instrument by which it is given or devised that the interest

58 Am. St. Rep. 729; *Stokes v. Amerman*, 121 N. Y. 337; *Campbell etc. Co. v. Damon*, 48 Hun, 509; *Carver v. Barker*, 73 Hun, 416.

<sup>36</sup> *Venable v. Rickenberg*, 152 Mass. 64; *Myers v. Amey*, 21 Md. 302; *Wright v. Henderson*, 7 How. (Miss.) 539; *Hopkins v. Carey*, 23 Miss. 54; *Bridgman v. McKissack*, 15 Iowa, 260; *Mattocks v. Humphreys*, 17 Ohio, 336.

<sup>37</sup> *Odenheimer v. Hanson*, 4 McLean, 437; *Smith v. McCann*, 24 How. 398; *Hopkins v. Carey*, 23 Miss. 54; *Love v. Graham*, 25 Ala. 187; *Smith v. Parker*, 41 Me. 452; *Marshall v. Marshall*, 2 Bush, 415; *Williams v. Michenor*, 3 Stockt. Ch. 521; *Godbold v. Lambert*, 8 Rich. Eq. 155, 70 Am. Dec. 192; *Newell v. Morgan*, 2 Harr. (Del.) 225; *Walcott v. Almy*, 6 McLean, 23; *Rucker v. Abell*, 8 B. Mon. 566; 48 Am. Dec. 406; *Demaree v. Driskell*, 3 Blackf. 115.

<sup>38</sup> *Athey v. Knotts*, 6 B. Mon. 24; *Dietz v. Atwood*, 19 Ill. App. 96; *Kirby v. Bruns*, 45 Mo. 234, 100 Am. Dec. 376.

<sup>39</sup> *Bennett v. Dillingham*, 2 Dana, 436; *Athey v. Knotts*, 6 B. Mon. 24; *Bank of Commerce v. Chambers*, 96 Mo. 459. But these cases show that equity will not aid a creditor to obtain satisfaction out of the property which the latter is entitled to from his wife, until a sum has been settled on her sufficient for her support.

of the beneficiary can neither be reached by execution nor by creditor's bill. This is unquestionably true when the duration of the beneficiary's enjoyment is, by the instrument creating the trust, to terminate on his becoming indebted, or a bankrupt, or upon an attempt to subject the property to execution.<sup>40</sup> No doubt a person cannot create a trust for his own benefit, and impose the condition that such trust or its proceeds shall not be subject to the payment of his debts. But a person may create a trust, and vest property in trustees who are to pay the proceeds of the trust at stated periods to a third person, during the term of his life, for his support. In such circumstances, the beneficiary has, in a majority of the states, no interest which can be reached under a creditor's bill, unless, perhaps, when he permits the amounts to which he is entitled to accumulate and remain in the hands of the trustees, and it appears that they are not necessary for his support.<sup>41</sup> Except with respect to those trusts which we have sought to describe in a previous section, and which are so limited by the donor that the interest of the donee cannot be subjected to execution, every conceivable equitable interest is subject to a

<sup>40</sup> Ante, § 189 a.

<sup>41</sup> Ante, § 189 a; *Lippincott v. Evens*, 35 N. J. Eq. 553; *Staub v. Williams*, 5 Lea, 458; *Cruger v. Coleman*, 75 Ga. 695; *Russell v. Milton*, 133 Mass. 180; *Porter v. Lee*, 88 Tenn. 782; *Arzbacher v. Mayer*, 53 Wis. 380; *Campbell v. Foster*, 35 N. Y. 361; *Stewart v. McMartin*, 5 Barb. 438; *Locke v. Mabbett*, 2 Keyes, 457; 3 Abb. Ct. App. 68; *Bramhall v. Ferris*, 14 N. Y. 41; *Graff v. Bonnett*, 31 N. Y. 9; *Wetmore v. Truslow*, 51 N. Y. 338; *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666; *Scott v. Nevius*, 6 Duer, 672; *Clute v. Bool*, 8 Paige, 83; *Rider v. Mason*, 4 Sand. Ch. 351; *Degraw v. Clason*, 11 Paige, 136; *Genet v. Foster*, 18 How. Pr. 50; *Hann v. Van Voorhis*, 15 Abb. Pr., N. S., 79; *Nichols v. Eaton*, 3 Cent. L. J. 38; *Fisher v. Taylor*, 3 Rawle, 33; *Shankland's Appeal*, 47 Pa. St. 113; *Leavitt v. Belrne*, 21 Conn. 1. But see *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295.

creditor's bill, whether such interest is declared in some instrument or otherwise avowed by the parties,<sup>42</sup> or is secret and undeclared, and results from transfers or encumbrances absolute in form, but intended to hinder or defraud creditors.<sup>43</sup> In Massachusetts, it was held that a creditor's bill could not be maintained to compel a trustee, when the death of the equitable tenant for life should occur, to satisfy plaintiff's judgment out of the share of such fund to which the debtor would then become entitled as devisee of an equitable remainder in such fund. The dismissal of the bill was placed upon the ground that it would be improper to make an order "to take effect at a future and uncertain time, for the transfer to the creditor of the property of his debtor, without ascertaining its value by judicial sale or appraisal."<sup>44</sup>

A creditor's bill will not lie to compel a judgment debtor to so exercise a power or discretion vested in him as to promote their interest. A devise of property was made to E. B., with direction to convey such property to R. B., or such person as he should, during his lifetime, request. It was insisted that R. B. should, in favor of the creditors, either be treated as the owner of the property, or compelled to exercise his power of appointment in favor of himself, and thus subject

<sup>42</sup> *Chardavoyne v. Galbraith*, 81 Ala. 521; *Augusta Sav. Bank v. Crossman*, 7 Atl. Rep. 396; *Jackson v. Von Zedlitz*, 136 Mass. 342; *Jones v. Reese*, 65 Ala. 134; *Edmeston v. Lyde*, 1 Paige, 637, 19 Am. Dec. 454; *Freedman's Savings & T. Co. v. Earle*, 110 U. S. 710; *Spindle v. Shreve*, 111 U. S. 542; *Schultz v. Blackford*, 9 Lea, 431; *Hoagland v. Wilson*, 15 Neb. 320; *Evans v. Wall*, 159 Mass. 164, 38 Am. St. Rep. 406.

<sup>43</sup> *Sayre v. Thompson*, 18 Neb. 33; *Coon v. Henry*, 49 Mich. 208; *Reeg v. Burnham*, 55 Mich. 39; *Arzbacher v. Mayer*, 53 Wis. 890; *Hutchinson N. B. v. Crow*, 56 Ill. App. 558; *Thomas v. Van Meter*, 62 Ill. App. 309; *Fechheimer v. Hollander*, 6 Mackey, 512.

<sup>44</sup> *Bartholomew v. Weld*, 127 Mass. 210.

the property to the payment of his creditors. But the court held that "no title or interest in the thing vests in the donor of the power until he exercises the power. It is virtually an offer to him of the estate or fund, that he may receive or reject at will, and like any other offer to donate property to a person, no title can vest until he accepts the offer; nor can a court of equity compel him to accept the property or fund against his will, even for the benefit of creditors. If it should, it would be to convert the property of the person offering to make the donation to the payment of the debts of another person. Until accepted, the person to whom the offer is made has not, nor can he have, the slightest interest or title in the property."<sup>45</sup> But it seems that if the donor of the power attempts to execute it in favor of a volunteer, "the court will seize the fund and apply it to the satisfaction of the debts of the donor of the power."<sup>46</sup>

An estate by sufferance, or a mere permissive occupancy,<sup>47</sup> or a bare possibility,<sup>48</sup> cannot be reached by a creditor's bill. As we understand the rule, it is uncertainty in the cause of action, and not in the amount of the recovery thereon, which exempts it from proceedings on behalf of a creditor. Hence, if there is a cause of action, such as the right to an accounting as a member of a partnership, it is subject to a creditors' suit, though it is not known whether or not such accounting will result in favor of the judgment debtor.<sup>49</sup>

It still remains doubtful, where there has been no legislation upon the subject, whether in the absence of

<sup>45</sup> *Gilman v. Bell*, 99 Ill. 144; *Holmes v. Coghill*, 7 Ves. 499.

<sup>46</sup> *Bainton v. Ward*, 2 Atk. 172.

<sup>47</sup> *Waggoner v. Speck*, 3 Ohio, 293; *Gentry v. Harper*, 2 Jones Eq. 177.

<sup>48</sup> *Smith v. Kearney*, 2 Barb. Ch. 533.

<sup>49</sup> *Gooding v. King*, 30 Ill. App. 160.

fraud, or any other well-known ground for supporting the exercise of its jurisdiction, equity will assist a creditor to reach those assets of his debtor which, under no circumstances, could have been subject to execution at law. This question has been most debated with reference to stocks and other choses in action. Notwithstanding a contrary opinion expressed by some very eminent American jurists, we judge that the weight of the authorities is in support of the view that equity has no power, in ordinary cases, to compel the appropriation of choses in action to the payment of their owners' debts, unless they have first, by statute, been declared subject to execution.<sup>50</sup> But where a sequestration of the property of a defendant is being made, a person who admits owing him a sum certain may be compelled to make payment thereof to the sequestrators.<sup>51</sup> It has also been insisted that, where there is no other method of obtaining satisfaction, equity ought to and will interpose for the purpose of compelling satisfaction to be made out of the defendant's choses in action.<sup>52</sup> In many of the states, stat-

<sup>50</sup> *Greene v. Keene*, 14 R. I. 388, 51 Am. Rep. 400; *Dundas v. Duttens*, 1 Ves. Jr. 196; *Nantes v. Corrock*, 9 Ves. 188; *Francis v. Wiggzell*, 1 Madd. 264; *Rider v. Kidder*, 10 Ves. 368; *McCarthy v. Goold*, 1 Ball & B. 389; *Grogan v. Cooke*, 2 Ball & B. 233; *Watkins v. Dorsett*, 1 Bland, 533; *Stewart v. English*, 6 Ind. 176; *Shaw v. Aveline*, 5 Ind. 380; *People v. Stanley*, 6 Ind. 410; *Keightley v. Walls*, 27 Ind. 384; *Williams v. Reynolds*, 7 Ind. 622; *McFerran v. Jones*, 2 Litt. 219; *Donovan v. Finn*, Hopk. Ch. 59, 14 Am. Dec. 531; *Harper v. Clayton*, 84 Md. 346, 57 Am. St. Rep. 407.

<sup>51</sup> *Francklyn v. Colhoun*, 3 Swanst. 276; *Pelham v. Newcastle*, 3 Swanst. 290; *Keighler v. Nicholson*, 4 Md. Ch. 87; *Wilson v. Metcalf*, 1 Beav. 263; *Keighler v. Ward*, 8 Md. 254; *Johnson v. Chippindall*, 2 Sim. 55; *White v. Geraerdt*, 1 Edw. Ch. 340.

<sup>52</sup> *Caillaud v. Estwick*, 1 Aust. Jur. 381; *Pendleton v. Perkins*, 49 Mo. 565; *Powell v. Howell*, 63 N. C. 283; *Edmeston v. Lyde*, 1 Paige, 637, 19 Am. Dec. 454; *Bayard v. Hoffman*, 4 Johns. Ch. 450; *Taylor v. Jones*, 2 Atk. 600; *King v. Dupine*, 2 Atk. 603, note; *Stin-*

utes have been enacted in harmony with this view.<sup>53</sup> Thus the supreme judicial court of Massachusetts is, by statute, given jurisdiction over "bills by creditors, to reach and apply in payment of a debt any property, right, title, or interest, legal or equitable, of the debtor which cannot be come at to be attached or taken in execution in a suit at law against such debtor."<sup>54</sup> Under this statute, choses in action are subject to a creditors' bill,<sup>55</sup> provided their character is such that they cannot be reached at law.<sup>56</sup> If, however, a chose in action has, by statute, been exempted from liability for the payment of its owner's debts, it is thereby exempted from a creditors' suit.<sup>57</sup> The same result must follow if a chose in action is one which the holder has no power to assign, for the creditors' suit does not increase his powers, nor compel him to do any act which is forbidden or legally impossible.<sup>58</sup> Hence it has been held that a cause of action for a personal tort is not subject to a creditors' suit, although a verdict has been returned thereon, if judgment remains to be en-

son v. Williams, 35 Ga. 170; Rogers v. Jones, 1 Neb. 417; Drake v. Rice, 130 Mass. 410. A debtor may be compelled to assign to a receiver, in a creditor's suit, a policy of insurance on the debtor's life. Burton v. Farinholt, 86 N. C. 260; Anthracite Ins. Co. v. Sears, 109 Mass. 383.

<sup>53</sup> Davis v. Sharron, 15 B. Mon. 64; Estill v. Rodes, 1 B. Mon. 314; Patterson v. Campbell, 9 Ala. 933; Wright v. Petrie, 1 Smedes & M. Ch. 282; Crozier v. Young, 3 T. B. Mon. 158; Fuller v. Taylor, 2 Halst. Ch. 301; Tantum v. Green, 21 N. J. Eq. 364; Long v. Page, 10 Humph. 541; Hitt v. Ormsbee, 14 Ill. 233; Bryans v. Taylor, Wright, 245.

<sup>54</sup> Gen. St. Mass., ch. 151, § 1, sub. 11.

<sup>55</sup> Rice v. Stone, 1 Allen, 566; Lord v. Harte, 118 Mass. 271; Tucker v. McDonald, 105 Mass. 423; Anthracite I. Co. v. Sears, 109 Mass. 383.

<sup>56</sup> Schlesinger v. Sherman, 127 Mass. 206.

<sup>57</sup> Geer v. Horton, 159 Mass. 259.

<sup>58</sup> Pettibone v. Toledo etc. R. Co., 148 Mass. 411.

tered.<sup>59</sup> A draft drawn by the treasurer of the United States, though the holder may not be able to maintain any action thereon, for the reason that the sovereign power cannot be sued, is, nevertheless, controlled by the rules of law applicable to other commercial paper of like character, and may, therefore, be transferred by the holder. If found within the state, though in the custody of an agent of the payee, the latter not being within the state, it may be reached by a creditors' bill, and if the agent, disregarding such bill, surrenders the draft, he may be compelled to account for its proceeds.<sup>60</sup>

Though the right to subject a chose in action to creditors' suit be conceded either as the result of statutes authorizing it, or of decisions of the courts independent of such statutes, a demand may be of such a character that its exemption from the general rule is necessarily implied. Thus, if a wife obtains a decree directing her husband to pay alimony for her support, his obligation is, by the court, regarded as a duty rather than as a debt. To compel him to apply such alimony to the payment of her creditors instead of to her support would be to compel him to discharge a duty which he never owed to her and to neglect one which has been established by a judgment of the court. Hence a creditors' bill to compel him to pay such alimony to her judgment creditor cannot be sustained.<sup>61</sup>

Whether choses in action founded upon torts are subject to creditors' suit must depend upon whether they are, by the law of the state, assignable. If they

<sup>59</sup> *Bennett v. Sweet*, 171 Mass. 600; *Thayer v. Southwick*, 8 Gray, 229.

<sup>60</sup> *McCann v. Randall*, 147 Mass. 81, 9 Am. St. Rep. 666.

<sup>61</sup> *Andrews v. Whitney*, 82 Hun, 117; *Romaine v. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544.

are not, then they are not subject to such suits,<sup>62</sup> otherwise they are so subject.<sup>62a</sup> Especially is this true if the right of action is for injury to the property of the judgment debtor.<sup>63</sup>

What stocks, choses in action, franchises, and other property which was not subject to execution at common law, can now, in the absence of any statute on the subject, be reached by a creditors' bill, must still be regarded as unsettled. By such bills, creditors have, in several instances, succeeded in obtaining satisfaction out of the interest of an heir or distributee while still in the hands of an executor or administrator;<sup>64</sup> out of a right of dower before the assignment and segregation thereof;<sup>65</sup> out of moneys collected under execution and still in the hands of the sheriff;<sup>66</sup> out of moneys earned, but not due;<sup>67</sup> and out of money collected un-

<sup>62</sup> *Bennett v. Sweet*, 171 Mass. 600.

<sup>62a</sup> *Staples v. May*, 87 Cal. 178.

<sup>63</sup> *German N. B. v. First N. B.*, 55 Neb. 86; *Hudson v. Plets*, 11 Paige, 180.

<sup>64</sup> *Moore v. White*, 3 Gratt. 139; *Ryan v. Jones*, 15 Ill. 1; *Sayre v. Flournoy*, 3 Kelly, 541; *Farrar v. Haselden*, 9 Rich. Eq. 331; *Caldwell v. Montgomery*, 8 Ga. 106; *Lang v. Brown*, 21 Mich. 179, 56 Am. Dec. 244; *Ricketson v. Merrill*, 148 Mass. 76; *Bush v. Arnold*, 50 Mo. App. 8. But in some of these cases the action of the court was sanctioned by statute. Funds in hands of an executor de son tort may be reached. *Watts v. Gayle*, 20 Ala. 817.

<sup>65</sup> *Stewart v. McMartin*, 5 Barb. 438; *Tomkins v. Fonda*, 4 Paige, 448; *Petefish v. Buck*, 56 Ill. App. 149; *Payne v. Becker*, 87 N. Y. 153; *Boltz v. Stoltz*, 41 Oh. St. 540. This rule prevails under the statutes of Massachusetts, *Forbes v. Lathrop*, 137 Mass. 523; *McMahon v. Gray*, 150 Mass. 289, 15 Am. St. Rep. 202, but it is doubtful whether it may be maintained in the absence of statutory authority, for the right of a dowress before assignment is a mere chose in action, and choses in action, as we have already shown, are not subject to creditors' bills. *Harper v. Clayton*, 84 Md. 346, 57 Am. St. Rep. 407.

<sup>66</sup> *Brenan v. Burke*, 6 Rich. Eq. 200.

<sup>67</sup> *Thompson v. Nixon*, 3 Edw. 457; *Browning v. Bettis*, 8 Paige, 568.



der an invalid assignment.<sup>68</sup> It has also been determined that a creditor of a corporation can sustain a creditor's bill to compel the stockholders to pay to him delinquent subscriptions upon its stock.<sup>69</sup> At the instance of creditors proceeding in equity, receivers have been appointed to collect the tolls and enjoy the franchises of corporations;<sup>70</sup> and in England a receiver was appointed "of the office of master forester of a royal forest."<sup>71</sup> But in this country, the salaries of public officers are not subject to execution, and therefore cannot be reached by a creditors' suit.<sup>72</sup>

Property which is exempt from execution at law is equally exempt from proceedings in creditors' suits.<sup>73</sup> Property is sometimes declared not to be subject to execution because of the peculiar circumstances in which it is found. The most familiar instance of this is property in the custody of the law, as where it is in the possession of a clerk, sheriff, or other officer of the court, or in that of the treasurer of the state or of a county or other municipal corporation. We are aware of several decisions holding that money and property so exempt from garnishment and from levy and sale under ex-

<sup>68</sup> *Blood v. Marcuse*, 38 Cal. 590, 99 Am. Dec. 435.

<sup>69</sup> *Cochran v. American O. Co.*, 20 Abb. N. C. 114; *Henry v. V. & A. R. R. Co.*, 17 Ohio. 187; *Miers v. Z. & M. T. Co.*, 11 Ohio, 273; 13 Ohio, 197; post, § 426.

<sup>70</sup> *Macon & W. R. R. Co. v. Parker*, 9 Ga. 377; *Miers v. Z. & M. T. Co.*, 11 Ohio, 273; *Covington D. Co. v. Shepherd*, 21 How. 112; *Tripp v. C. R. W. Co.*, 17 Jur. 887, 21 E. L. & E. 53.

<sup>71</sup> *Blanchard v. Cawthorne*, 4 Sim. 566.

<sup>72</sup> *Heilbronner v. Posey* (Ky.), 45 S. W. 505; *Bank of Tennessee v. Dibrell*, 3 Sneed, 379.

<sup>73</sup> *Finnin v. Malloy*, 1 Jones & S. 382; *Cooney v. Cooney*, 65 Barb. 524; *Hudson v. Plets*, 11 Paige, 180; 7 N. Y. Leg. Obs. 120; *Andrews v. Rowan*, 28 How. Pr. 126; *McDonald v. McDonald*, 11 N. Y. Supp. 248.

ecution is equally exempt from a creditors' suit.<sup>74</sup> These decisions apply the rule where the reasons for it do not exist. These reasons are, that property in the custody of the law cannot be interfered with without committing a contempt of court, encouraging conflicts between agents of different judicial tribunals, and perhaps rendering their judgments inoperative, or requiring public officers to turn aside from their official duties for the purpose of becoming collecting agencies of private individuals. To a creditors' suit it is not indispensable that the custodian of the money or property sought to be reached be a party, for an injunction may issue to prevent any transfer by the judgment debtor, who may be compelled to assign his cause of action or his interest in the property sought to be reached, and the assignee may be authorized to collect it in the same manner which the debtor might lawfully have pursued but for his assignment. Hence, where a judgment debtor's voluntary assignment of a fund or property in custody of law, or of his interest therein, is valid and enforceable, we see no objection to compelling an assignment to be made by him in a creditors' suit.<sup>75</sup>

There are certain intangible rights and interests susceptible of voluntary transfer, but from their intangible character not capable of being seized and sold under execution. Instances of these are the rights and privileges secured to inventors by the granting to them of letters patent, and the right to membership in a stock

<sup>74</sup> *Addyston S. Co. v. Chicago*, 58 Ill. App. 273; *Addyston S. Co. v. Chicago*, 170 Ill. 580; *Anheuser-Busch B. Co. v. Hler*, 52 Neb. 424; *United States v. Elsenbeis*, 88 Fed. Rep. 4.

<sup>75</sup> *Riggin v. Hilliard*, 56 Ark. 476, 35 Am. St. Rep. 113; *Speed v. Brown*, 10 B. Mon. 108; *Knight v. Nash*, 22 Minn. 452; *Pendleton v. Perkins*, 49 Mo. 565.

board, or exchange, or like body. It is now quite well settled that all these may be subjected to execution through the instrumentality of creditors' bills.<sup>76</sup> Contracts to pay an author royalties on works to be thereafter sold,<sup>77</sup> and the right to use a trademark,<sup>78</sup> in connection with a manufacturing business, may also be reached by a creditors' suit. Whether the goodwill of a business is subject to a creditors' suit has not been necessarily determined, but the intimations upon the subject, so far as they extend, indicate that it is not.<sup>79</sup>

**§ 426. Equity will not Interfere while a Legal Remedy Exists.**—If the defendant has property subject to levy and sale at law, the levy and sale of which have not been obstructed by any fraudulent transfer or lien, or by concealment, the plaintiff must take out his execution and seek its satisfaction by the methods provided by law. It is always a sufficient answer to a creditors' bill, that the defendant has property subject to execution, and of sufficient value to satisfy the plaintiff's demand.<sup>80</sup> As long as the plaintiff has a sufficient remedy at law, equity will not interfere for his relief. In such a case he needs no relief, and must be content to

<sup>76</sup> *Ayer v. Murray*, 105 U. S. 126; *Pacific Bank v. Robinson*, 57 Cal. 520, 40 Am. Rep. 120; *Gillett v. Bate*, 86 N. Y. 87, 10 Abb. N. C. 88; *Matthews v. Green*, 19 Fed. Rep. 649; *Vail v. Hammond*, 60 Conn. 374, 25 Am. St. Rep. 330; *Beldler v. Crane*, 125 Ill. 92, 25 Am. St. Rep. 349; *Wilson v. Martin F. A. Co.*, 149 Mass. 24, 151 Mass. 515.

<sup>77</sup> *Lord v. Harte*, 118 Mass. 271.

<sup>78</sup> *Warren v. Warren Thread Co.*, 134 Mass. 247.

<sup>79</sup> *Tierney v. Klein*, 67 Miss. 173; *Lillenthal v. Drucklieb*, 84 Fed. Rep. 918.

<sup>80</sup> *Storm v. Badger*, 8 Paige, 130; *Canaday v. Nuttall*, 2 Ired. Eq. 265; *Wilson v. Dale*, 5 Ind. 163; *Clark v. Strong*, 16 Ohio. 317; *Second Ward Bank v. Upmann*, 12 Wis. 499; *Starr v. Rathbun*, 1 Barb. 70; *Congdon v. Lee*, 3 Edw. Ch. 304; *Parker v. Moore*, 3 Edw. Ch. 234; *Marr v. Southwick*, 2 Port. 351.

pursue his rights in the methods prescribed by law.<sup>81</sup> Hence while a creditors' bill can, under the old system of practice, be maintained for the purpose of discovering assets, the rule is said to be otherwise where, by statutes authorizing the summoning and examining the defendant as a witness at law, a bill for such discovery is rendered unnecessary.<sup>82</sup> If the property which the complainant seeks to subject to the payment of his debt is subject to attachment or garnishment,

<sup>81</sup> *Mill River F. A. v. Claffin*, 9 Allen, 101; *Latham v. Barlow*, 6 Blackf. 97; *Scott v. Ware*, 64 Ala. 174; *Sweezy v. Jones*, 65 Iowa, 272; *Williams v. Sexton*, 19 Wis. 42; *Lupton v. Lupton*, 3 Cal. 120; *Tyler v. Peatt*, 30 Mich. 63; *Wilson v. Forsyth*, 24 Barb. 105; *Weatherford v. Myers*, 2 Duvall, 91; *Jordan v. Stephenson*, 17 Iowa, 514; *Coleman v. Rives*, 24 Miss. 634; *Lawson v. Grubbs*, 44 Ga. 466; *Pease v. Scranton*, 11 Ga. 33; *Herrlich v. Kaufman*, 99 Cal. 271, 37 Am. St. Rep. 50; *Robinson v. Springfield Co.*, 21 Fla. 203; *Preston v. Colby*, 117 Ill. 477; *Scheubert v. Honel*, 152 Ill. 313; *Stirlen v. Jewett*, 165 Ill. 410; *Hall v. Rothschild (Ky.)*, 44 S. W. 108; *Ames v. Sheehan*, 161 Mass. 274; *Nash v. Burchard*, 87 Mich. 85; *Weaver v. Cressman*, 21 Neb. 675; *Woolfolk v. Kemper*, 31 Mo. App. 421; *Wilkinson v. Goodin*, 71 Mo. App. 394; *Burne v. Kunzman (N. J. Ch.)*, 19 Atl. Rep. 667; *Early Times D. Co. v. Zeigler (N. M.)*, 49 Pac. 723; *Halsted v. Halsted*, 47 N. Y. Supp. 649; *Meier v. Waco State Bank (Tex. Civ. App.)*, 27 S. W. 881; *Weber v. Weber*, 90 Wis. 467; *Hughes v. Hunner*, 91 Wis. 116; *Scott v. Neely*, 140 U. S. 106; *Merchants' Bank v. Sabin*, 34 Fed. Rep. 492; *Bryan v. May*, 9 App. D. C. 383. But "the right to impeach a fraudulent transfer is not affected by the fact that the debtor may have other property. The creditor has the choice of the part upon which he will levy, and the debtor cannot take away the election." *Bump on Fraudulent Conveyances*, 519, citing *Vasser v. Henderson*, 40 Miss. 519, 90 Am. Dec. 351; *Wadsworth v. Havens*, 3 Wend. 411; *Wadsworth v. Williams*, 100 Mass. 126; *Gaylord v. Couch*, 5 Day, 223; *Botsford v. Beers*, 11 Conn. 369. We doubt the correctness of the rule as stated by Mr. Bump and believe that a court of equity ought not to interfere with a transfer while the grantor has ample property with which to satisfy the complainant. *Dunham v. Cox*, 2 Stockt. Ch. 437; *Harris v. Taylor*, 15 Cal. 348.

<sup>82</sup> *Hall v. Joiner*, 1 S. C. 186. See 5 *Walt's Pr.* 640, 641.

he must pursue that remedy.<sup>83</sup> And generally, if there is an adequate remedy in any other tribunal, it must be sought there. A creditors' suit was brought against an administrator of an insolvent estate and others, alleging that he and they had so obtained the title to certain real property as to raise a constructive trust in favor of the estate, and praying that he and they be required to convey such property to the estate. It was held that the parties had certain remedies in the probate court—to wit, they might obtain the removal of the administrator and the appointment of another in his place, who could be compelled to bring an appropriate action for the recovery of the property, or they might cause certain proceedings to be taken in the probate court, for the discovery of assets of the deceased debtor—and that, not having employed any of these remedies, they were not entitled to proceed by creditors' bill.<sup>84</sup>

There are cases in which the existence of a legal remedy does not preclude the complainant from seeking an equitable one. These are cases in which the legal remedy is not complete and adequate, or in which the suit may properly proceed in equity because based upon fraud or some other ground of equitable cognizance. Thus a transfer made to defraud creditors may doubtless be treated as void, and the judgment creditor whom it was designed to defraud may levy upon and sell the property as that of the fraudulent vendor. But

<sup>83</sup> *Schlesinger v. Sherman*, 127 Mass. 206; *Stephens v. Whitehead*, 75 Ga. 294; *Weaver v. Cressman*, 21 Neb. 675; *Moffatt v. Tuttle*, 35 Minn. 301; *Weakley v. Cockrill*, 6 Lea, 270; *Godding v. Pierce*, 13 R. I. 532; *Stephens v. Whitehead*, 75 Ga. 294; *Humphries v. Atlantic M. Co.*, 98 Mo. 542; *Clapp v. Smith*, 16 R. I. 368.

<sup>84</sup> *Mesmer v. Jenkins*, 61 Cal. 151; *Herrlich v. Kaufman*, 99 Cal. 277, 37 Am. St. Rep. 55; *State v. Parsons*, 147 Ind. 579, 62 Am. St. Rep. 430.

he cannot know in advance whether he will be able to establish the supposed fraud, and after proceeding to sell, he must still incur the risk of another suit to establish the fraud and recover the property. Furthermore, until the fraudulent transfer is assailed and overthrown, he cannot expect that strangers to the action will purchase the property, unless at a greatly depreciated price. He is therefore entitled to proceed, in the first instance, by creditors' bill to establish the fraudulent character of the transfer and compel a sale of the property, and his right so to proceed is sustained by both grounds, viz., the inadequacy of the remedy at law and the fact that he seeks relief on the ground of fraud.<sup>85</sup> But in this class of cases relief will not be granted, where it appears that the remedy at law is ample, and that the creditors' claim may be satisfied without resort to equity, as where, though the intent of the debtor was to defraud his creditors by a transfer, it does not appear, but, notwithstanding the transfer, he retains other property amply adequate to satisfy the judgment, and therefore that his creditor may, by issuing execution thereon, coerce the payment of his debt.<sup>86</sup> Hence, it has been held that if there are sev-

<sup>85</sup> *Multnomah Street Ry. Co. v. Harris*, 13 Or. 198; *Towle v. Janvrin*, 61 N. H. 605; *Mann v. Appel*, 31 Fed. Rep. 378; *Vicksburgh M. R. Co. v. Phillips*, 64 Miss. 108; *Powers v. Raymond*, 137 Mass. 483; *Rhead v. Hounson*, 46 Mich. 243; *Sheppard v. Iverson*, 12 Ala. 97; *Quinn v. People*, 45 Ill. App. 547; *Brown v. Kimball Co.*, 84 Me. 402; *Central N. B. v. Doran*, 109 Mo. 40; *Mississippi Mills v. Cohn*, 150 U. S. 202. Contra, *Field v. Jones*, 10 Ga. 229; *Latham v. Barlow*, 6 Blackf. 97; *Mill River F. A. v. Clafin*, 9 Allen, 101; *Bessman v. Cronan*, 65 Ga. 559; *Taylor v. Johnson*, 113 Ind. 164.

<sup>86</sup> *Harris v. Tayler*, 15 Cal. 348; *Birdsall v. Waggoner*, 4 Colo. 256; *Brumbaugh v. Richcreek*, 127 Ind. 240, 22 Am. St. Rep. 649; *State v. Parsons*, 147 Ind. 579, 62 Am. St. Rep. 430; *Brock v. Rich*, 76 Mich. 644; *Pierce v. Rich*, 76 Mich. 648; *Dunham v. Cox*, 10 N. J. Eq. 467, 64 Am. Dec. 460; *Rutherford v. Alyea*, 54 N. J. Eq. 411; *Rigleberger v. Kibler*, 1 Hill Ch. 113, 26 Am. Dec. 192.

eral judgment debtors, one of whom makes a fraudulent conveyance, their creditor cannot attack it by a creditors' suit, if the other debtors have property sufficient to satisfy his judgment.<sup>87</sup> In Mississippi, on the other hand, the courts maintain that the rule inhibiting the creditor from maintaining a suit to vacate a fraudulent conveyance, when the debtor has other property subject to execution sufficient to satisfy the writ, applies only to voluntary conveyances made without any fraudulent intent, and that as to conveyances infected with actual fraud, a creditors' suit may be maintained, though it does not appear but the complainant has an ample remedy by proceeding against other property of his debtor.<sup>88</sup> This decision was, however, in the judgment of the court, made inevitable by its construction of the statute of that state purporting to confer jurisdiction on courts of chancery to set aside fraudulent conveyances at the instance of creditors, whether they have obtained judgment or not, "as if the complainant had a judgment, and execution returned 'No property found.' " A similar effect has been attributed to the statutes of Alabama.<sup>89</sup> In Florida, a like conclusion was reached, though apparently not due to any special statute.<sup>90</sup>

It is not in any case sufficient to oust the jurisdiction of courts of equity that there be some remedy at law. It must "be adapted to the particular exigency, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."<sup>91</sup>

<sup>87</sup> *Eller v. Lacey*, 137 Ind. 436; *Randolph v. Daly*, 16 N. J. Eq. 313; *Wales v. Lawrence*, 36 N. J. Eq. 207.

<sup>88</sup> *Citizens' Bank v. Buddig*, 65 Miss. 284.

<sup>89</sup> *McClarin v. Anderson*, 109 Ala. 571.

<sup>90</sup> *Robinson v. Springfield Co.*, 21 Fla. 203.

<sup>91</sup> *Sabin v. Anderson*, 31 Or. 107; *Johnson v. Miller*, 50 Ill. App. 60; *Mann v. Appel*, 31 Fed. Rep. 578.

The remedy at law must also be one which may be pursued with success in the courts of the state. A judgment creditor is not required to resort to the courts of another state for the purpose of levying upon, and selling, the property of the judgment debtor said to be situated there before proceeding by a creditors' suit to attack a fraudulent transfer made within the state where the judgment was rendered.<sup>92</sup>

**§ 427. What Demands will Support Creditors' Suits.** Equity does not ordinarily interfere in behalf of a person who, though he claims to be a creditor, has not established the amount and validity of his claim by a judgment at law.<sup>93</sup> This rule is sometimes said to be founded on the assumption that if the complainant's claim is not established and made certain by a judgment in his favor, it may be found that equity has interposed on behalf of one who in the end was not shown to be a creditor. Hence, there have been instances in which a creditors' suit has been sustained, though his claim had not been reduced to judgment,

<sup>92</sup> O'Brien v. Stambach, 101 Ia. 40, 63 Am. St. Rep. 368.

<sup>93</sup> Smith v. Railroad Company, 99 U. S. 398; Dahlman v. Jacobs, 15 Fed. Rep. 863; Weil v. Raymond, 142 Mass. 206; Shufeldt v. Boehm, 96 Ill. 560; Thompson v. Caton, 3 Wash. Ter. 31; Massey v. Gorton, 12 Minn. 145, 90 Am. Dec. 287, and note; Hall v. Joiner, 1 S. C. 186; Mech. & T. B. v. Dakin, 28 How. Pr. 502; Young v. Frier, 1 Stockt. Ch. 465; Barrow v. Balley, 5 Fla. 9; Berryman v. Sullivan, 13 Smedes & M. 65; Newman v. Willetts, 52 Ill. 98; Shirley v. Shields, 8 Blackf. 273; Skeelee v. Stanwood, 33 Me. 307; Kelso v. Blackburn, 3 Leigh, 299; Rambaut v. Mayfield, 1 Hawks, 85; Neusbaum v. Kelm, 1 Hilt. 520; Williams v. Brown, 4 Johns. Ch. 682; Greenway v. Thomas, 14 Ill. 271; Turner v. Adams, 46 Mo. 95; Screven v. Bostick, 2 McCord Ch. 410, 16 Am. Dec. 664; Cubbedge v. Adams, 42 Ga. 124; Clark v. Banner, 1 Dev. & B. Eq. 608; Peyton v. Lamar, 42 Ga. 131; Robinson v. West, 14 B. Mon. 3; Beardsley S. Co. v. Foster, 36 N. Y. 561; Dewey v. Eckert, 62 Ill. 218; Mugge v. Ewing, 54 Ill. 236; Sanders v. Watson, 14 Ala. 198.



where its validity and amount had been in some mode so admitted as not to be subject to further controversy.<sup>94</sup> In these cases, there were other conceded facts from which it was apparent that any further pursuit of the legal remedy must be idle. Perhaps, however, the better reason for the rule is, that equity does not interpose in favor of one who has a remedy at law until he has pursued that remedy as far as he may, and has found it to be unavailing, and ordinarily he cannot so pursue it except by recovering judgment. At all events, the rule is well settled.<sup>95</sup>

The exceptions to this rule, unless created by statute, are very rare, and are confined to cases where the claim of the complainant is one of which equity has exclusive cognizance, or where he has some lien upon the property or fund, or the circumstances are such that no judgment can be procured at law.<sup>96</sup> Thus, in

<sup>94</sup> Talley v. Curtain, 54 Fed. Rep. 43; Tompkins v. Catawba Mills, 82 Fed. Rep. 780. Contra, England v. Russel, 71 Fed. Rep. 818.

<sup>95</sup> Hood v. Saunders, 11 Colo. 106; Union T. Co. v. Trumbull, 137 Ill. 146; Ladd v. Johnson, 71 Ill. App. 283; affirmed, 174 Ill. 344, 66 Am. St. Rep. 267; Austin v. Bruner, 169 Ill. 178; Barnes v. Sammons, 128 Ind. 596; Ware v. De Lahaye, 95 Ia. 667; Goode v. Garrity, 75 Ia. 713; State Bank v. Chatten, 59 Kan. 303; McMurty v. Montgomery M. T., 86 Ky. 206; Weil v. Raymond, 142 Mass. 206; Jenks v. Horton, 114 Mich. 48; Gens v. Hargadine, 56 Mo. App. 245; Fairbanks M. Co. v. Welshans, 55 Neb. 362; Frothingham v. Hodenpyl, 16 N. Y. Supp. 341; affirmed, 130 N. Y. 630; Griswold v. Sundback, 4 S. D. 441; McKeldin v. Gouldin, 91 Tenn. 677; Johnson v. Riley, 41 W. Va. 140; Weber v. Weber, 90 Wis. 467; Fein v. Fein, 3 Wyo. 161; George v. St. Louis etc. R. Co., 44 Fed. Rep. 117; Scott v. Neely, 140 U. S. 106; Cates v. Allen, 149 U. S. 451; Hollins v. Brierfield C. Co., 150 U. S. 371.

<sup>96</sup> Merchants' Nat. Bank v. Paine, 13 R. I. 592; Scott v. McMillen, 1 Litt. 302, 13 Am. Dec. 239; Claflin v. Anderson, 37 Fla. 78; Albany etc. S. Co. v. Southern A. Works, 76 Ga. 135, 2 Am. St. Rep. 26; Steere v. Hoagland, 39 Ill. 264; Ladd v. Judson, 71 Ill. App. 283; Reyburn v. Mitchell, 106 Mo. 365, 27 Am. St. Rep. 350; Pendleton v. Perkins, 49 Mo. 565; Peay v. Morrison, 10 Gratt. 149; Russell v. Clark, 7 Cranch, 87.

some of the states, a creditors' bill may be sustained against a nonresident, on the ground that otherwise the plaintiff would be entirely without means of redress.<sup>97</sup>

In Alabama, Maryland, Massachusetts, Tennessee, Virginia, and West Virginia, statutes have been enacted allowing creditors, before judgment, to maintain actions to set aside conveyances made in fraud of their rights.<sup>98</sup> It has been held that these statutes do not authorize a chancery court of the United States situated in one of these states to entertain a creditors' bill on behalf of a simple contract debtor, whose debt is not admitted, on the ground that as to such alleged debt, the debtor is entitled to a trial by jury, and because "the line of demarcation between equitable and

<sup>97</sup> *Corn Exch. Bank v. Applegate*, 91 Ia. 411; *Patchen v. Rofar*, 42 N. Y. Supp. 35; *Kinlock v. Meyer*, 1 Spear Eq. 427; *Peay v. Morrison*, 10 Gratt. 149; *Curd v. Letcher*, 3 J. J. Marsh. 443; *Scott v. McMillen*, 1 Litt. 302, 13 Am. Dec. 239; *Farrar v. Haselden*, 9 Rich. Eq. 331; *Pope v. Solomon*, 36 Ga. 541; *Moores v. White*, 3 Gratt. 139; *Pendleton v. Perkins*, 49 Mo. 565; *Comstock v. Rayford*, 1 Smedes & M. 423, 40 Am. Dec. 102; contra, *Reese v. Bradford*, 13 Ala. 837; *Smith v. Moore*, 35 Ala. 76; *Quart v. Abbett*, 102 Ind. 233, 52 Am. Rep. 662; *Merchants' Bank v. Paine*, 13 R. I. 592; *Ginn v. Brown*, 14 R. I. 524.

<sup>98</sup> *Reynolds v. Welch*, 47 Ala. 200; *Crompton v. Anthony*, 13 Allen, 33; Maryland Code, art. 16, § 35; Virginia Code, chap. 179, § 2; *Barry v. Abbot*, 100 Mass. 396; *Sanger v. Bancroft*, 12 Gray, 365; West Virginia Code, 1891, p. 651; *Jones v. Massey*, 79 Ala. 370; *Silloway v. C. I. Co.*, 8 Gray, 199; *Moody v. Gay*, 15 Gray, 457; *August v. Seeskind*, 6 Coldw. 166; *Greene v. Starnes*, 1 Helsk. 582; *Wooten v. Steele*, 109 Ala. 565, 55 Am. St. Rep. 947; *Freeman v. Pullen*, 119 Ala. 235; *Sanford v. Soule P. Co.*, 164 Mass. 85; *Citizens' Bank v. Buddig*, 65 Miss. 284; *Bank v. Harris*, 84 N. C. 206; *Hancock v. Wooten*, 109 N. C. 69; *Le Duc v. Brandt*, 110 N. C. 289. This rule applies in Indiana and Maryland to suits to avoid fraudulent transfers. *Phelps v. Smith*, 116 Ind. 399; *Balls v. Balls*, 69 Md. 388. For rule in England, see *Reese River M. Co. v. Atwell*, L. R. 7 Eq. 347.

legal remedies in the federal courts cannot be obliterated by state legislation.”<sup>99</sup>

In the absence of statutes prescribing a different rule, it is probable that a creditors' bill may be sustained upon any domestic judgment or decree<sup>100</sup> upon which an execution may issue. It is not material that the cause of action upon which the judgment was rendered did not rest in contract. Hence, a creditors' suit may be based upon a decree directing the payment of alimony,<sup>101</sup> or a judgment awarding damages for injuries suffered for the commission of a tort.<sup>102</sup> Nor is it any answer to allege that the wrong on account of which the judgment was recovered was one in which the complainant participated, and hence that she ought not thus to be aided in a court of equity. Speaking of a creditors' bill in favor of the mother of an illegitimate child, the supreme court of Wisconsin said: “It is contended that a resort to equity to collect a bastardy judgment is not permissible; that in such cases the two parties are equally at fault; and that equity will not help the one at the expense of the other. The answer is, that the statute gives the mother of the child a right of action against the father of the child for her own benefit and protection. The judgment is manifestly based upon a

<sup>99</sup> *Hollins v. Brierfield C. Co.*, 150 U. S. 371; *Atlanta etc. R. Co. v. Western R. Co.*, 50 Fed. Rep. 790; *United States v. Ingate*, 48 Fed. Rep. 351.

<sup>100</sup> *Weightman v. Hatch*, 17 Ill. 281; *Speiglemyer v. Crawford*, 6 Paige, 254; *Farnsworth v. Strasler*, 12 Ill. 482; *Shainwald v. Lewis*, 7 Saw. 148; *Winslow v. Leland*, 128 Ill. 304; *Bacon v. Harris*, 62 Fed. Rep. 99.

<sup>101</sup> *Hall v. Harrington*, 7 Colo. App. 474; *Harrington v. Johnson*, 7 Colo. App. 483; *Twell v. Twell*, 7 Mont. 19; *Wetmore v. Wetmore*, 149 N. Y. 520, 52 Am. St. Rep. 752.

<sup>102</sup> *Petree v. Brotherton*, 133 Ind. 692; *Carblener v. Montgomery*, 97 Ia. 659; *Lydecker v. Smith*, 44 Hun, 454.

statutory right of action, and must, therefore, until satisfied, be regarded as the conclusive evidence of an existing indebtedness.”<sup>103</sup> It is no valid objection to a creditors’ suit that his judgment or execution is irregular, for chancery will not undertake to decide upon the regularity of either.<sup>104</sup> It may, however, occasionally delay its proceedings to permit the question of regularity or irregularity to be settled by appropriate motions or other proceedings at law, and it will not aid a judgment shown to be void for want of jurisdiction over the defendant.<sup>105</sup> This rule is applicable to judgments founded upon the attachment of the property of a nonresident, which, though they are valid to the extent of authorizing a sale of such property, do not create any personal liability against the defendant.<sup>106</sup>

In New York, a creditors’ bill must be based upon a claim for not less than one hundred dollars.<sup>107</sup> But it is sufficient if the judgment sued upon, together with the costs, amounts to that sum;<sup>108</sup> or if two or more plaintiffs joining in one action, together hold judgments which, in the aggregate, amount to one hundred dollars.<sup>109</sup> A judgment entered in a justice’s court

<sup>103</sup> *Pierstoff v. Jorge*, 86 Wis. 128, 39 Am. St. Rep. 881.

<sup>104</sup> *Newman v. Willetts*, 60 Ill. 519; *Sandford v. Sinclair*, 8 Paige, 373; *Williams v. Hogeboom*, 8 Paige, 469; *Platt v. Cadwell*, 9 Paige, 386; *Bradford v. Read*, 2 Sand. Ch. 163; *Ryder v. Mason*, 4 Sand. Ch. 351; *Henry v. V. & A. R. R. Co.*, 17 Ohio, 187; *Hone v. Woolsey*, 2 Edw. Ch. 289; *Williams v. Hubbard*, 1 Mich. 446; *Johnston-Maakestad v. Johnson*, 44 Ill. App. 503; *Griffin v. McGavin*, 117 Mich. 372.

<sup>105</sup> *Anderson v. Hawhe*, 115 Ill. 33; *Johnson v. Parrotte*, 46 Neb. 51.

<sup>106</sup> *Capital City Bank v. Parent*, 134 N. Y. 527.

<sup>107</sup> *Newell v. Burbank*, 4 Edw. Ch. 536; *Shepard v. Walker*, 7 How. Pr. 46; *Thomas v. McEwen*, 11 Paige, 131.

<sup>108</sup> *Van Tyne v. Bunce*, 1 Edw. Ch. 583; *Spear v. Given*, 9 Paige, 362.

<sup>109</sup> *Dix v. Briggs*, 9 Paige, 595; *Sizer v. Miller*, 9 Paige, 605.

will enable the plaintiff to maintain a creditors' bill.<sup>110</sup>

It is, of course, essential that the judgment upon which the right of the creditor is founded remains unsatisfied.<sup>111</sup> A suit upon a judgment in the state wherein it was rendered, followed by a recovery in favor of the plaintiff, would probably merge the first judgment in the second, so that the creditors' suit must be based upon the latest adjudication between the parties. If, however, the suit and recovery are in another state, the judgment therein recovered could not constitute the basis of a creditors' suit in the state wherein the first judgment was recovered, and therefore imposes no impediment to a creditors' suit there.<sup>112</sup>

Almost innumerable dicta, and some decisions, may be found asserting that a creditor cannot successfully invoke the aid of equity, unless he has a lien upon the property which he seeks to have made to contribute to the satisfaction of his demand. If these dicta are sound, it must follow that no judgment can support a creditors' bill, unless it is such as creates a lien upon the property. But we judge the true rule to be, that the creditor must pursue his legal remedy as far as it is susceptible of being pursued; that he should, where he can do so, obtain a lien through the rendition or docketing of his judgment;<sup>113</sup> but that where the judgment is incapable of creating a lien, it may, notwithstanding, support either a creditors' bill, or a bill to remove obstructions fraudulently interposed to im-

<sup>110</sup> *Steere v. Hoagland*, 39 Ill. 264; *Ballentine v. Beall*, 3 Scam. 203; *Harlan v. Barnes*, 5 Dana, 219; *Newdigate v. Lee*, 9 Dana, 17; *Bailey v. Burton*, 8 Wend. 339. But in New York, such judgment should first be docketed so as to constitute a lien against real estate. *Dix v. Briggs*, 9 Paige, 595.

<sup>111</sup> *Rogers v. Welte*, 61 Mich. 258.

<sup>112</sup> *Wells v. Schuster-Hax N. B.*, 23 Colo. 534.

<sup>113</sup> *Barnes v. Belghly*, 9 Colo. 475.

pede the execution of such judgment.<sup>114</sup> The expiration of the judgment lien does not deprive the complainant of his right to maintain his suit, though in such case, the only lien which he can have is that acquired by the filing of his bill.<sup>115</sup> In Mississippi a lien is essential, and if the time in which a judgment operates as a lien has expired, the judgment creditor cannot sustain a creditors' suit thereon.<sup>116</sup>

A creditor is not entitled to the aid of equity when his judgment has become barred by the statute of limitations,<sup>117</sup> nor while his judgment is dormant, though he retains the right to revive it, and thereupon to issue an execution.<sup>118</sup> But his right to relief is not prejudiced by suing out an alias writ,<sup>119</sup> nor by bringing an action at law on his judgment.<sup>120</sup> The courts were very evenly divided on the question whether a creditors' suit can be maintained in a state court upon a judgment entered in a district or circuit court of the United States, sitting within the same state. On the one side, it is claimed that such judgments proceed from foreign tribunals, and therefore that they cannot be recognized;<sup>121</sup> on the other side, it is argued, and we think

<sup>114</sup> *Alnutt v. Leper*, 48 Mo. 319; *Merry v. Fremon*, 44 Mo. 518; *Arbuckle C. Co. v. Werner*, 77 Tex. 43.

<sup>115</sup> *Davidson v. Burke*, 143 Ill. 139, 36 Am. St. Rep. 367.

<sup>116</sup> *Hall v. Green*, 60 Miss. 47; *Fleming v. Grafton*, 54 Miss. 79; *Partee v. Matthews*, 53 Miss. 140.

<sup>117</sup> *Fox v. Wallace*, 31 Miss. 660.

<sup>118</sup> *Mullen v. Hewitt*, 103 Mo. 639.

<sup>119</sup> *Thomas v. McEwen*, 11 Paige, 131; *Cuyler v. Moreland*, 6 Paige, 273; *Storm v. Badger*, 8 Paige, 130; *Helm v. Hardin*, 2 B. Mon. 230.

<sup>120</sup> *Bates v. Lyons*, 7 Paige, 85; *Thomas v. McEwen*, 11 Paige, 131. These cases maintain the same rule when the action has proceeded to judgment; but this extension of the rule is obviously inapplicable in those states where a judgment merges the judgment on which it is based.

<sup>121</sup> *Steele v. Hoagland*, 39 Ill. 264; *Tarbell v. Griggs*, 3 Paige, 207, 23 Am. Dec. 790; *Winslow v. Leland*, 128 Ill. 304.

with great force and justness, that as to federal courts they are not "foreign" tribunals in the extreme sense of the term; and as their judgments create liens on real estate, and may be enforced by execution, that the state courts ought not to refuse to aid such enforcement.<sup>122</sup> The weight of authority now unquestionably affirms this view.<sup>123</sup>

With respect to judgments rendered in the courts of other states than that in which the creditor seeks the aid of chancery, it must be remembered that no execution can issue upon such judgments beyond the jurisdiction in which they are entered, and this fact seems a conclusive answer to a suit in aid of execution, but commenced outside of such jurisdiction.<sup>124</sup> In New York a creditors' bill may be sustained on a judgment of another state, if the defendant does not reside in New York, and has no property there except that which he has fraudulently procured to be conveyed to a resident of the state, and which is sought to be reached by the bill.<sup>125</sup> The national courts permit the maintenance of creditors' suits therein upon judgments rendered in the state courts, and, in some instances have done so though the judgment was that of the court of a state other than that in which the national court sat.<sup>126</sup> A better view, however, is that here,

<sup>122</sup> *Bullitt v. Taylor*, 34 Miss. 708, 69 Am. Dec. 412; *Brown v. Bates*, 10 Ala. 432.

<sup>123</sup> *Chicago & A. B. Co. v. Fowler*, 55 Kan. 17; *Chicago First N. B. v. Sloman*, 42 Neb. 350, 47 Am. St. Rep. 707; *Ballin v. Friend L. I. Co.*, 78 Wis. 404; *Chicago etc. B. Co. v. Anglo-American P. Co.*, 46 Fed. Rep. 584.

<sup>124</sup> *Farned v. Harris*, 11 Smedes & M. 366; *Dick v. Truly*, 1 Smedes & M. Ch. 557; *Ladd v. Judson*, 71 Ill. App. 283; 174 Ill. 344, 66 Am. St. Rep. 267; *First N. B. v. Randall*, 20 R. I. 319.

<sup>125</sup> *McCartney v. Bostwick*, 32 N. Y. 53; *Ocean N. B. v. Olcott*, 46 N. Y. 12.

<sup>126</sup> *Stultz v. Handley*, 41 Fed. Rep. 537; *Merchants' N. B. v. Chat-*

as in other cases, a creditor's suit cannot be maintained until he has exhausted his legal remedies in the jurisdiction wherein he seeks redress, and that he is not excused from so doing, though he has pursued his debtor in another state, unless he further shows it to be legally impossible for him to obtain a valid personal judgment or a valid lien by attachment in the state where the creditors' suit is filed in one of the national courts sitting therein.<sup>127</sup>

There is no doubt, as already suggested, that the recovery of a judgment at law will be excused when, from any reason, such recovery is impossible.<sup>128</sup> It becomes so impossible if the debtor was a corporation, but has been dissolved,<sup>129</sup> or, being a natural person, has been declared a bankrupt or insolvent, thus preventing the recovery of any effective judgment against him,<sup>130</sup> and also where he has absconded, and there is no means of obtaining such a service of process as will authorize the entry of a judgment against him, and no assets of his within the jurisdiction of the court on which an attachment can be levied.<sup>131</sup> If, however, he

tanooga C. Co., 53 Fed. Rep. 314; First N. B. v. Steinway, 77 Fed. Rep. 661.

<sup>127</sup> *Claffin v. McDermott*, 20 Blatchf. 522; *Walser v. Seligman*, 21 Blatchf. 130; *National Tube Works v. Ballou*, 146 U. S. 517.

<sup>128</sup> *Austin v. Bruner*, 169 Ill. 178; *National T. B. v. Wetmore*, 124 N. Y. 241; *Gardner v. Gardner*, 17 R. I. 751; *Beverly v. Rhodes*, 86 Va. 415.

<sup>129</sup> *Pullman v. Stebbins*, 51 Fed. Rep. 10.

<sup>130</sup> *Ruggles v. Cannedy (Cal.)*, 53 Pac. 911; *Plume & A. M. Co. v. Baldwin*, 87 Fed. Rep. 785.

<sup>131</sup> *Merchants' Bank v. Paine*, 13 R. I. 592; *Offutt v. King*, 1 McAr. 312; *Steere v. Hoagland*, 39 Ill. 264; *O'Brien v. Coulter*, 2 Blackf. 421; *Peay v. Morrison*, 10 Gratt. 149; *Pope v. Solomon*, 36 Ga. 541; *Johnson v. Jones*, 79 Ind. 141; *Brittain v. Quiet*, 1 Jones Eq. 328, 62 Am. Dec. 202; *Corn Exch. Bank v. Applegate*, 91 Ia. 411; *Overmire v. Haworth*, 48 Minn. 372, 31 Am. St. Rep. 660; *Patchen v. Rofkar*, 42 N. Y. Supp. 35.



has assets within the state which may be reached by attachment, the nonresidence of his debtor will not excuse a resort to that mode of redress, nor support a creditors' suit in the absence of a personal judgment within the jurisdiction wherein it is filed.<sup>132</sup> If a claim against a deceased person has been presented, and by the law of the state constitutes a lien on the assets of the decedent, it may be the basis of a creditors' bill, because of its being a lien, and on the further ground that it has been established, and the recovery of any further judgment thereon is neither necessary nor possible.<sup>133</sup> Generally, if because of the death of a debtor no further action can be maintained against him, it is sufficient to support a creditors' bill to show that the complainant has presented his demand to the personal representatives of the decedent, and obtained an allowance thereof, notwithstanding which the complainant's remedy remains inadequate, and this, whether such presentation and allowance of the claim create a lien or not.<sup>134</sup>

The general principle underlying creditors' suits is, that the creditor shall proceed at law as far as possible toward establishing the existence of his claim, and of obtaining its satisfaction when established. Hence he must ordinarily obtain a judgment, and take out execution thereon, and wait till it is returned *nulla bona*, or must show that his taking out such writ would be a vain act. Though an attachment has been issued and

<sup>132</sup> *Ladd v. Judson*, 174 Ill. 344, 66 Am. St. Rep. 267.

<sup>133</sup> *Haston v. Castner*, 31 N. J. Eq. 697; *Kennedy v. Cresswell*, 101 U. S. 641.

<sup>134</sup> *Werborn v. Kahn*, 93 Ala. 201; *Merchants' & M. T. Co. v. Borland*, 53 N. J. Eq. 282; *Rutherford v. Alyea*, 54 N. J. Eq. 411; *Cooke v. Chase*, 85 Hun. 616; *Gardner v. Gardner*, 17 R. I. 751; *Allen v. McRae*, 91 Wis. 226.

levied, and a lien thereby created, the claim on which it is based is not established nor rendered certain by judgment, and the final result of the litigation may show that the claim was partly or wholly unfounded. Any proceeding in the nature of a creditors' suit, prior to judgment in the attachment case, appears to be premature, and equity may well decline to act until it is certainly known that some action is required. The majority of the cases upon the subject at the present time, however, is opposed to what we deem to be the correct rule upon this subject, and maintains that upon the consummation of his attachment lien, the plaintiff in the action may proceed by creditors' bill to remove any fraudulent transfers which may obstruct proceedings for the satisfaction of his judgment, should one be recovered;<sup>135</sup> but the right to maintain a creditors'

<sup>135</sup> *Hahn v. Salmon*, 20 Fed. Rep. 801; *Scales v. Scott*, 13 Cal. 76; *Joseph v. McGill*, 52 Iowa, 128; *Smith v. Muirhead*, 34 N. J. Eq. 4; *Dawson v. Sims*, 14 Or. 561; *Evans v. Laughton*, 69 Wis. 138; *Tappan v. Evans*, 11 N. H. 311; *Cartwright v. Bamberger*, 90 Ala. 405; *Mansur I. Co. v. Jones*, 143 Mo. 253; *Cocks v. Varney*, 45 N. J. Eq. 72; *Harding v. Elliott*, 91 Hun, 502; *People v. Van Buren*, 136 N. Y. 352; *Lopez v. Merchants' & F. N. B.*, 46 N. Y. Supp. 91; 18 App. Div. 427; *Bennett v. Minot*, 28 Or. 339; *Benham v. Ham*, 5 Wash. 128, 34 Am. St. Rep. 851; *New York C. Co. v. Francis*, 83 Fed. Rep. 769; *Rinchey v. Striker*, 28 N. Y. 45, 84 Am. Dec. 324; *Conroy v. Woods*, 13 Cal. 626, 73 Am. Dec. 605; *Bickerstaff v. Doub*, 19 Cal. 109, 79 Am. Dec. 204; *Robert v. Hodges*, 16 N. J. Eq. 299; *Kimbrow v. Clark*, 17 Neb. 403; *Merriam v. Sewell*, 8 Gray, 316; *Kenard v. Hollenbeck*, 17 Neb. 363; *Heyneman v. Dennenberg*, 6 Cal. 376, 65 Am. Dec. 519. The case last cited is approved in *Scott v. Scales*, 13 Cal. 78, and in *Conroy v. Woods* and *Bickerstaff v. Doub*, cited above; but is in conflict with *McMinn v. Whelan*, 27 Cal. 316. The latter case ignores the prior cases on the same subject, and reaches a conclusion directly antagonistic to theirs. Thus, the court said: "If the defendant O'Connor had a lien on the premises by reason of the attachment, that lien could not be rendered effectual for the purpose of impeaching the conveyance to the plaintiff until judgment obtained in the suit of *Gleason v. Maume*, and it is possible

suit terminates when the attachment ceases to be a lien, as where it is dissolved by the death of the defendant.<sup>136</sup> The minority of the authorities maintains, and we think with the better reason, that an attachment lien will not support a creditors' bill; because, until judgment is entered, it cannot be known that there will be any occasion for the plaintiff either to reach equitable assets or remove obstructions to his execution.<sup>137</sup>

**§ 428. To Maintain a Creditors' Bill, a Return of Nulla Bona must have been Made.**—When a judgment creditor desires to bring a creditors' bill for the purpose of reaching assets which are not subject to execution at law, he must generally take out execution upon his judgment, place it in the sheriff's hands, and wait till that officer makes a return thereon, showing that he can find no property subject thereto. By this means he completely exhausts his legal remedies, and shows that they are unavailing. Then, and not before, he may successfully invoke the aid of equity to reach equitable assets.<sup>138</sup> The issuing and return should be

that no such judgment will be obtained. If the defendant O'Connor was, at the commencement of this action, and when it was tried, the creditor of Matthew Maume, he was simply a creditor at large without a judgment, and, hence, was not in a position to maintain an action by his answer in the nature of a cross-bill in equity to set aside the conveyance made to the plaintiff."

<sup>136</sup> Phillips v. Ash, 63 Ala. 414.

<sup>137</sup> Brooks v. Stone, 19 How. Pr. 395; Weil v. Lankins, 3 Neb. 384; Tennent v. Battey, 18 Kan. 324; Martin v. Michael, 23 Mo. 50, 66 Am. Dec. 656; Melville v. Brown, 16 N. J. L. 364; Thurber v. Blanck, 50 N. Y. 80; McMinn v. Whelan, 27 Cal. 300.

<sup>138</sup> Shea v. Dulin, 2 McAr. 339; Baxter v. Moses, 77 Me. 465, 52 Am. Rep. 783; Meissner v. Meissner, 68 Wis. 336; Robinson v. Springfield Co., 21 Fla. 203; Taylor v. Bowker, 111 U. S. 110; Payne v. Sheldon, 63 Barb. 169; Miller v. Davidson, 3 Gilm. 518, 44 Am. Dec. 715; Chittenden v. Brewster, 2 Wall. 191; Griffin v. Nitcher, 57 Me. 270; Ishmael v. Parker, 13 Ill. 324; Scott v. Wallace, 4 J. J. Marsh. 654; Wooley v. Stone, 7 J. J. Marsh. 302; Thurmond v. Reese, 3

in the bona fide pursuit of the complainant's legal remedy, and should have the effect of exhausting it. It is, therefore, essential that the writ should be valid and one under which a levy might rightfully be made.<sup>139</sup> Hence if issued without an order of court, where such an order is required, it cannot support a creditors' bill.<sup>140</sup> Ordinarily, the writ should be issued to the county where the debtor resides, but it has been held that writs issued to the county in which he had formerly resided and whence he had absconded were sufficient, where there was nothing to indicate that he had any property subject to execution in the county of his residence.<sup>141</sup> If a judgment creditor knows, or has reason to believe, that the debtor has property in differ-

Kelly, 449, 46 Am. Dec. 440; Dunlevy v. Tallmadge, 32 N. Y. 457; Scott v. McFarland, 34 Miss. 363; Suydam v. N. W. Ins. Co., 51 Pa. St. 394; Snodgrass v. Andrews, 30 Miss. 472, 64 Am. Dec. 169; McConnel v. Dickson, 43 Ill. 99; Jones v. Green, 1 Wall. 330; McDermutt v. Strong, 4 Johns. Ch. 687; Morgan v. Crabb, 3 Port. 470; Newman v. Willetts, 52 Ill. 98; Heacock v. Durand, 42 Ill. 230; Manchester v. McKee, 4 Gilm. 511; Willis v. Moore, Clarke's Ch. 150; Maynard v. Hoskins, 9 Mich. 485; Farned v. Harris, 11 Smedes & M. 366; Vasser v. Henderson, 40 Miss. 519, 90 Am. Dec. 351; Taylor v. Persee, 15 How. Pr. 417; Tappan v. Evans, 11 N. H. 311; Brown v. Bank, 31 Miss. 454; Neubert v. Massman, 37 Fla. 91; Illinois M. I. Co. v. Graham, 55 Ill. App. 266; Beldler v. Douglas, 35 Ill. App. 124; Austin v. Bruner, 65 Ill. App. 301; Comstock C. S. Co. v. Baldwin, 169 Ill. 636; Treadway v. Turner (Ky.), 10 S. W. 816; Vanderpool v. Notley, 71 Mich. 422; Home Bank v. Brewster, 41 N. Y. Supp. 203; Easton Bank v. Buffalo C. Works, 48 Hun, 557; Compton v. Patterson, 28 S. C. 152; Ahlhauser v. Doud, 74 Wis. 400; Gilbert v. Stockman, 81 Wis. 602, 29 Am. St. Rep. 922; Buckeye E. Co. v. Donau B. Co., 47 Fed. Rep. 6; Union T. Co. v. Boker, 89 Fed. Rep. 6. In Virginia, however, it is said to be well established that if a judgment creditor has a lien by virtue of a judgment on real property, he may maintain a creditors' bill without first issuing an execution, especially if it appears that the debtor has no personal property subject to the writ. Moore v. Bruce, 85 Va. 139.

<sup>139</sup> Behan v. Warfield, 90 Ky. 151.

<sup>140</sup> Aultman & Co. v. Syme, 48 N. Y. Supp. 231.

<sup>141</sup> Allis v. Newman, 33 Neb. 597.

ent counties, writs must be issued in all.<sup>142</sup> If the writ is required to be issued in a specified number of days before the return day, it must be for that length of time in the possession of the proper officer, and cannot be regarded as issued while in the hands of the plaintiff or of his attorney.<sup>143</sup> The return must go farther than to show that the writ remains unsatisfied. It must be sufficient to establish that the defendant has no property subject to execution.<sup>144</sup> A return is, however, usually deemed conclusive, and hence the right to maintain suit cannot be defeated by proving that the defendant in fact had property subject to execution, unless the plaintiff was in fault in procuring the return. Otherwise the only remedy of the defendant is by an action against the officer for a false return.<sup>145</sup>

Cases occasionally arise in which no execution can issue, and in which its issuance must either be waived, or the judgment creditor must be denied all means of redress. This happens in many of the states when the judgment debtor has died and the law does not authorize an execution to issue against his executor or administrator. In these states, a creditors' bill to reach the assets of the deceased can be supported without taking out execution.<sup>146</sup> In Tennessee, a creditors' bill will be allowed to reach an equitable interest in

<sup>142</sup> *Durand v. Gray*, 129 Ill. 9; *National Bank v. Dwight*, 83 Mich. 189.

<sup>143</sup> *National Bank v. Dwight*, 83 Mich. 189, 192.

<sup>144</sup> *Gibson v. Robinson*, 90 Ga. 756, 35 Am. St. Rep. 250; *Langford v. Few*, 146 Mo. 142, 69 Am. St. Rep. 606; *Buckeye E. Co. v. Donau B. Co.*, 47 Fed. Rep. 6.

<sup>145</sup> *Clements v. Waters*, 90 Ky. 96.

<sup>146</sup> *Steere v. Hoagland*, 39 Ill. 264; *Snodgrass v. Andrews*, 30 Miss. 472, 64 Am. Dec. 169; *McDowell v. Cochran*, 11 Ill. 31; *Bay v. Cook*, 31 Ill. 336; *O'Brien v. Coulter*, 2 Blackf. 421; *Merry v. Fremon*, 44 Mo. 518; *Pharis v. Leachman*, 20 Ala. 662; *Lyons v. Murray*, 95 Mo. 23, 6 Am. St. Rep. 17; *Lefevre v. Phillips*, 81 Hun, 232.

real estate, although no execution has been issued. This is because the judgment is, in that state, a lien on such interest, whether execution has been taken out or not.<sup>147</sup>

Where a return of *nulla bona* is required, it must show that none of the defendants has any property subject to execution.<sup>148</sup> If the return is, in fact, made, it will sustain the suit, though not filed.<sup>149</sup> The writ need not be kept in the officer's hands until the return day. He may return it at any time, on becoming satisfied of his inability to find any property subject to it, and his return, when made, is as effective as though he had taken all the time permitted by law before making it.<sup>150</sup> A return made before the return day must, however, appear to be the act of the officer, or at all events, it is fatal to it that it appears to be made under the direction of the plaintiff or his attorney, and without any bona fide attempt to discover and seize property subject to execution.<sup>151</sup> On the other hand, if the sheriff has, without success, sought satisfaction of the writ and become convinced that the defendant had no property subject thereto, the plaintiff or his attorney may, without impropriety, request that a return of *nulla bona* be at once made, and its force, when made,

<sup>147</sup> *McNairy v. Eastland*, 10 Yerg. 310; *Montgomery v. McGee*, 7 Humph. 234.

<sup>148</sup> *Voorhees v. Howard*, 4 Keyes, 371; 4 Abb. App. 503; *Child v. Brace*, 4 Paige, 309; *Howard v. Sheldon*, 11 Paige, 558; contra, *Bates v. Cobb*, 29 S. C. 295, 13 Am. St. Rep. 742.

<sup>149</sup> *Iselin v. Henlein*, 16 Abb. N. C. 73; *Clark v. Dakin*, 2 Barb. Ch. 36; *Ocean N. B. v. Olcott*, 46 N. Y. 12.

<sup>150</sup> *Ward v. Whitfield*, 64 Miss. 754; *Young v. Clapp*, 40 Ill. App. 312; *Thompson v. Marsh*, 61 Ill. App. 269; *Tuthill v. Goss*, 89 Hun. 609.

<sup>151</sup> *Scheubert v. Honel*, 50 Ill. App. 597; *Stirlen v. Jewett*, 63 Ill. App. 55; 165 Ill. 410; *Hartley v. Atkins*, 64 Ill. App. 502.

will not be impaired by the fact that it was made before the return day named therein.<sup>152</sup>

§ 429. Whether the Insolvency of the Defendant can Excuse Plaintiff from Taking out Execution and Having It Returned Unsatisfied.—Certainly a very great number of the decisions speak of the issuing of execution and the return of nulla bona thereon as indispensable to the maintenance of a creditors' bill to obtain satisfaction out of the equitable assets of the defendant. But obviously, the reason on which these decisions rest is, that the complainant ought not to be granted relief in equity while he has an adequate remedy at law, and that the issue of execution, and its return wholly or partly unsatisfied, show that the legal remedy is insufficient. But such issue and return are simply evidence tending to establish a fact which is deemed necessary to warrant the action of equity. Now, if the existence of the fact is established or conceded, ought not that of itself to warrant such action? Does jurisdiction rest upon the fact, or upon the mode in which the fact is made manifest? Naturally and logically, we should answer these questions by stating that it is the fact alone which is indispensable, and that while the proof of the fact ordinarily assumes a particular form, yet that any other form of proof, equitably satisfactory, would be equally admissible. And we believe the majority of the decisions in which these questions have been necessarily answered have given those answers which we deem natural and logical, and have affirmed that if a defendant is without property subject to execution, the plaintiff need not pursue the useless formality, and submit to the needless and danger-

<sup>152</sup> Illinois M. I. Co. v. Graham, 51 Ill. App. 266; Howe v. Babcock, 72 Ill. App. 68; Huntington v. Metzger, 158 Ill. 272.

ous delay involved in the issuing and returning of an execution.<sup>153</sup> But, on the other hand, it must be admitted that many courts of great respectability have been unable to see that the most palpable and irretrievable insolvency of the defendant warranted the introduction of any exception to the general rule, that the plaintiff cannot come into equity until after he has pursued all the remedies accorded him at law.<sup>154</sup> The appointment of a receiver does not necessarily establish the insolvency of the defendant, nor withdraw all his property from execution. Hence, it is said not to excuse a judgment creditor from issuing an execution and awaiting its return *nulla bona* before filing his bill.<sup>155</sup> If, however, a receivership draws all the property of the judgment debtor into a court of equity for administration, it is clear there can be no further levy thereon under execution, and a judgment creditor may, therefore, commence his suit without first procuring the issuing and return of an execution.<sup>156</sup>

**§ 430. Whether Execution must have Issued to Sustain a Bill to Remove Fraudulent Obstruction.**—At law, a transfer or lien made for the purpose of hindering, delaying, or defrauding creditors is, as against the per-

<sup>153</sup> *Postlewait v. Howes*, 3 Iowa, 365; *Turner v. Adams*, 46 Mo. 95; *Harrison v. Battle*, 1 Dev. Eq. 537; *Tabb v. Williams*, 4 Jones Eq. 352; *Sage v. Memphis R. R.*, 125 U. S. 361; *Heyneman v. Dannenberg*, 6 Cal. 376. 65 Am. Dec. 519; *Walker v. Sedgwick*, 8 Cal. 403; *Hager v. Schindler*, 29 Cal. 58; *O'Brien v. Stambach*, 101 Ia. 40. 63 Am. St. Rep. 368; *Edson v. Cummings*, 52 Mich. 55; *Lewis v. Harwood*, 28 Minn. 458; *Meacham A. Co. v. Swarts*, 2 Wash. Ter. 417; *Stahlman v. Watson* (Tenn. Ch. App.), 89 S. W. 1055.

<sup>154</sup> *Crippen v. Hudson*, 13 N. Y. 162; *McElwain v. Willis*, 9 Wend. 548; *Mixon v. Dunklin*, 48 Ala. 455; *Parish v. Lewis*, 1 Freem. Ch. 299.

<sup>155</sup> *Russell v. Chicago T. & S. Co.*, 139 Ill. 538.

<sup>156</sup> *Comstock-Castel S. Co. v. Baldwin*, 169 Ill. 636; *Blair v. Illinois S. Co.*, 159 Ill. 350.



sons sought to be defrauded, utterly void. They may levy their executions on such property, and proceed regardless of the lien or transfer.<sup>157</sup> The lien or transfer, nevertheless, in fact though not in law, forms a serious obstacle to the creditors, because it prevents a sale of the property at its market value, and constitutes a cloud upon the purchaser's title after such sale is made. Equity will, therefore, interpose to remove such an obstacle, so that the creditor may, in fact as well as in law, be able to proceed without detriment from the fraudulent transfer or lien. Nor is it indispensable that, before calling upon equity, he should have proceeded so far in the pursuit of his legal remedies as when he seeks to reach assets which are not subject to execution at law. He need proceed only so far as to entitle him to a lien on the property. If the judgment is a lien, he may maintain his suit without issuing any execution; and if it is not a lien, then, while he must have the writ issued, he need proceed only so far as to levy it, for by such levy he creates a lien.<sup>158</sup> But in New York, and perhaps in some of the

<sup>157</sup> Ante, § 136.

<sup>158</sup> *Wadsworth v. Schisselbauer*, 32 Minn. 84; *Dodge v. Griswold*, 8 N. H. 425; *Tappan v. Evans*, 11 N. H. 311; *Dunham v. Cox*, 10 N. J. Eq. 457; *Loving v. Palro*, 10 Iowa, 282, 77 Am. Dec. 100; *Vasser v. Henderson*, 40 Miss. 519, 90 Am. Dec. 351; *Cornell v. Radway*, 22 Wis. 260; *Shaw v. Dwight*, 27 N. Y. 244, 84 Am. Dec. 275; *Snodgrass v. Andrews*, 30 Miss. 472, 64 Am. Dec. 169; *Dargan v. Waring*, 11 Ala. 988; *Newman v. Willetts*, 52 Ill. 98; *Payne v. Sheldon*, 63 Barb. 169; *Armstrong v. Kelfer*, 39 Ind. 225; *Miller v. Davidson*, 3 Gilm. 518, 44 Am. Dec. 715; *Weightman v. Hatch*, 17 Ill. 281; *Clarkson v. De Peyster*, 3 Paige, 320; *Vanderveer v. Stryker*, 4 Halst. Eq. 175; *Rhodes v. Cousins*, 6 Rand. 188, 18 Am. Dec. 715; *Parshall v. Tillou*, 13 How. Pr. 7; *Heye v. Bolles*, 2 Daly, 231; *Stock Growers' Bank v. Newton*, 13 Colo. 245; *Post v. Roach*, 26 Fla. 442; *Austin v. Morrison N. B.*, 47 Ill. App. 224; *Quinn v. People*, 45 Ill. App. 547; *Dillman v. Nadelhoffer*, 56 Ill. App. 517, 162 Ill. 625; *Andrews v. Donnerstag*, 70 Ill. App. 236; *Lane v. Union N. B.*, 75 Ill. App. 200;

other states, it is necessary to have issued an execution in all cases; and courts of equity will not set aside a fraudulent transfer unless in aid of an execution returned nulla bona, or one in the hands of the sheriff for service.<sup>159</sup>

The ground upon which equity originally interfered to remove fraudulent obstructions was, that the creditor had obtained an interest in or a lien upon the property, and was unable to have the full advantage of the lien or interest while the obstruction was permitted to continue.<sup>160</sup> Hence the creditor was required to at least perfect his lien before he called for aid to remove an alleged obstruction thereto; and he was sometimes required to go far enough at law to show that he had there elected to attach his lien upon the same kind of property from which he, in equity, sought to remove the obstruction. Hence he could not remove a fraudulent transfer from real estate until after he had elected to pursue real estate by suing out an *elegit*.<sup>161</sup>

*Wisconsin G. Co. v. Gerrity*, 144 Ill. 77; *Hughes v. Noyes*, 171 Ill. 575; *McConnell v. Citizens' State Bank*, 130 Ind. 127; *Bernard v. Myroleum Co.*, 147 Mass. 356; *Vanderpool v. Notley*, 71 Mich. 422; *Scanlan v. Murphy*, 51 Minn. 536; *Lewis v. Cline* (Miss.), 5 So. 112; *Columbus N. B. v. Hollerin*, 31 Neb. 558; *Early Times L. Co. v. Zelger* (N. M.), 49 Pac. 723; *Paulson v. Ward*, 4 N. D. 106; *Matlock v. Babb*, 31 Or. 516; *McKenna v. Crowley*, 16 R. I. 364; *Miller v. Hughes*, 38 S. C. 530; *Meinhard v. Youngblood*, 41 S. C. 312.

<sup>159</sup> *Lichtenberg v. Herdtfelder*, 33 Hun, 57; *Adsit v. Butler*, 87 N. Y. 585; *Gladius v. Fogel*, 88 N. Y. 434; *McCullough v. Colby*, 5 Bosw. 477; *North A. F. I. Co. v. Graham*, 5 Sand. 197; *Dana v. Haskill*, 41 Me. 25; *Barton v. Barton*, 80 Ky. 212; *Kyle v. O'Neil*, 88 Ky. 127; *National T. Bank v. Wetmore*, 124 N. Y. 241; *Easton N. B. v. Buffalo C. Works*, 48 Hun. 557; *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922; *Krouskop v. Krouskop*, 95 Wis. 296.

<sup>160</sup> *Hillzheim v. Drane*, 10 Smedes & M. 556.

<sup>161</sup> *Story's Eq. Jur.*, § 1216 b; *Neate v. Duke of Marlborough*, 3 Mylne & C. 407. So, in New York, a creditor cannot go into equity until he has taken out execution against the same kind of property

So in Maine, a creditor cannot set aside a fraudulent transfer of real estate until he has made a levy and procured a conveyance thereof, if it is subject to levy.<sup>162</sup> But this is contrary to the general rule, which, as we have already shown, requires the creditor to do no more than to perfect his lien on the property which he seeks to pursue. If the property is real estate, this may be done by the entry and docketing of a judgment; and if it is personalty, the lien may usually be perfected by the entry of judgment and the issue of execution thereon. In either case, there is no necessity for a return of nulla bona.<sup>163</sup>

An execution from one of the supreme courts of the state of New York, in order to sustain a creditors' bill, must issue to the county in which the defendant resides,<sup>164</sup> at the time of its issuance, or else some legal excuse must be shown for having it issued to another

which he there seeks to reach. *Dix v. Briggs*, 9 Paige, 595; *Coe v. Whitbeck*, 11 Paige, 42.

<sup>162</sup> *Griffin v. Nitcher*, 57 Me. 270; *Webster v. Clark*, 25 Me. 313; *Webster v. Withey*, 25 Me. 327; *Hartshorn v. Eames*, 31 Me. 93; *Corey v. Green*, 51 Me. 115; *Dockray v. Mason*, 48 Me. 178.

<sup>163</sup> *Brainard v. Van Kurnan*, 22 Iowa, 261; *Rhodes v. Cousins*, 6 Rand. 188, 18 Am. Dec. 715; *Armstrong v. Kelfer*, 39 Ind. 225; *Crippen v. Hudson*, 13 N. Y. 102; *Beck v. Burdett*, 1 Paige, 305, 19 Am. Dec. 436; *Angel v. Draper*, 1 Vern. 399; *Shirley v. Watts*, 3 Atk. 200; *Grimsley v. Hooker*, 3 Jones Eq. 4, 67 Am. Dec. 227; *Thurmond v. Reese*, 3 Kelly, 449, 46 Am. Dec. 440; *Stephens v. Beal*, 4 Ga. 319; *Mohawk Bank v. Atwater*, 2 Paige, 54; *Sanders v. Watson*, 14 Ala. 198; *Henderson v. McVay*, 32 Ala. 471. In Mississippi, a return of nulla bona has been said to be necessary. *Brown v. Bank of Miss.*, 31 Miss. 454. Where the existence of a lien is indispensable to the maintenance of a suit, a bill to remove a fraudulent transfer of personal property must be filed before the execution is returned, for by such return the lien is extinguished. *Forbes v. Logan*, 4 Bosw. 475; *Watrous v. Lathrop*, 4 Sandf. 700. An alias may be issued and a new lien thereby be created which will support a suit. *Cuyler v. Moreland*, 6 Paige, 273.

<sup>164</sup> *Strange v. Longley*, 3 Barb. Ch. 650.

county.<sup>165</sup> But if a judgment be properly recovered in a court which has no power to issue execution out of the county, and an execution be issued on such judgment and returned unsatisfied, a creditors' bill may be maintained on the judgment, though the defendant has ample assets subject to execution in another county.<sup>166</sup>

**§ 431. Who may Bring a Creditors' Suit.**—In answering this question, the rules hereinbefore stated must be taken into consideration. The complainant must be one who has exhausted his remedy at law to the extent already stated, and must show, that, notwithstanding, he is without redress. If he seeks to attack a transfer or lien which he claims to be infected with fraud, actual or constructive, he must show that his judgment is based upon a demand entitling him to make the attack. This question we have already considered, and we shall not here repeat either the rules there stated or the authorities cited.<sup>167</sup> Of course, the suit may, in a proper case, be maintained by an artificial as well as a natural person, and by the state as well as by a private citizen.<sup>168</sup>

A creditors' bill or a bill to remove a fraudulent lien or transfer, may be sustained by an assignee as well as by the original judgment creditor. In the United States, the assignee should bring his suit in his own name, because whether the transfer be recognized at law or not, he is, in equity, the owner of the judg-

<sup>165</sup> *Reed v. Wheaton*, 7 Paige, 663; *Merch. & M. B. v. Griffith*, 10 Paige, 519; *Hope v. Brinckerhoff*, 3 Edw. Ch. 445; *Manning v. Merritt*, Clarke Ch. 98; *Jones v. Smith*, 92 Ala. 455; *Rankin v. Rothschild*, 78 Mich. 10; *Sweet v. Converse*, 88 Mich. 1; *Hull v. Hull*, 35 W. Va. 155, 29 Am. St. Rep. 800.

<sup>166</sup> *Leggett v. Hopkins*, 7 Paige, 149.

<sup>167</sup> Ante, §§ 137, 137 a.

<sup>168</sup> *State v. Bowen*, 38 W. Va. 91.

ment.<sup>169</sup> The assignment need not be voluntary. It may result by operation of law or by application of the rules of equity. Whenever, from any cause, one person becomes entitled to enforce, for his own benefit, a cause of action which before belonged to another, the former may, if other circumstances justify it, maintain a creditors' suit. Hence, it may be maintained by one who is entitled to be subrogated to a lien or a right originally belonging to another.<sup>170</sup> But in England an assignee cannot sue in equity in his own name, without showing some special reason therefor, as that he has been refused the privilege of proceeding in the name of his assignor.<sup>171</sup> After an assignment has been made by one who has been declared a bankrupt, his assignee may maintain a suit to set aside a fraudulent transfer.<sup>172</sup> Receivers and sheriffs often become the representatives of the rights of the creditors, and in their representative capacities may sustain actions to set aside fraudulent transfers.<sup>173</sup>

<sup>169</sup> *Gleason v. Gage*, 7 Paige, 112; *Strange v. Longley*, 3 Barb. Ch. 650. These cases show that if a writ has been returned nulla bona before the assignment, the assignee need not cause a new writ to issue before bringing his suit. Upon this point the cases cited overrule *Wakeman v. Russel*, 1 Edw. Ch. 509, and *Fitch v. Baldwin*, 1 Clarke Ch. 106.

<sup>170</sup> *Hull v. Hull*, 35 W. Va. 155, 29 Am. St. Rep. 800.

<sup>171</sup> *Hammond v. Messenger*, 9 Sim. 332.

<sup>172</sup> *Bump on Fraudulent Conveyances*, p. 519; citing *Carr v. Hilton*, 1 Curt. 230; *Pratt v. Curtis*, 6 Nat. Bank. Reg. 139; *Bradshaw v. Klien*, 1 Nat. Bank. Reg. 146; *Shirley v. Long*, 6 Rand. 735; *Shackleford v. Collier*, 6 Bush, 149; *Weber v. Samuel*, 7 Pa. St. 500; *Stewart v. Isidor*, 5 Abb. Pr., N. S., 68; 1 Nat. Bank. Reg. 129; *Thomas v. Phillipps*, 9 Pa. St. 355; *Pillsbury v. Kingon*, 31 N. J. L. 620; *Day v. Cooley*, 118 Mass. 527.

<sup>173</sup> *Porter v. Williams*, 9 N. Y. 142, 12 How. Pr. 107, 59 Am. Dec. 519; *South Bend etc. Co. v. Pierre etc. I. Co.*, 4 S. D. 173; *Hamlin v. Wright*, 23 Wis. 491; *Kelly v. Lane*, 42 Barb. 594; 18 Abb. Pr. 229; 28 How. Pr. 128; *Bergen v. Littell*, 41 N. J. Eq. 18. But in *Hackley v. Mack*, 60 Mich. 591, it is said that there is no case in which a

Where an assignee of a bankrupt or insolvent or a receiver is appointed whose duty it is to act for the benefit of the bankrupt, insolvent, or other person, and the latter had assets which were subject to a creditors' suit, the right of the creditors to bring such action is usually suspended, or perhaps, more accurately speaking, is vested in their representative, the assignee or receiver.<sup>174</sup> The creditors may request such representative to bring the proper suit and offer to indemnify him against the expenses thereof, and if he refuses or unreasonably delays to act, they again become entitled to proceed.<sup>175</sup> Administrators, executors, and assignees under voluntary assignments made for the benefit of creditors represent both the decedent or assignor and his creditors. In the latter capacity they may bring suits to set aside fraudulent transfers made by such decedent or assignor, and then the question arises whether they are competent to maintain their suits. While the authorities are quite evenly divided, the majority sustains their right to sue.<sup>176</sup> If

sheriff may sustain a suit to vacate a fraudulent transfer; that such suit must always be in the name of the creditor defrauded thereby.

<sup>174</sup> *Brown v. Folsom*, 62 N. H. 527; *South Bend T. M. Co. v. Pierre etc. I. Co.*, 4 S. D. 173.

<sup>175</sup> *McMannomy v. Chicago etc. R. Co.*, 167 Ill. 497; *State v. State Bank*, 40 Neb. 192; *Lee v. Cole*, 44 N. J. Eq. 318; *Hamlin v. Bennett*, 52 N. J. Eq. 70; *Dittman v. Weiss* (Tex. Civ. App.), 31 S. W. 67.

<sup>176</sup> As to administrators and executors: *Ewing v. Handley*, 4 Litt. 346, 14 Am. Dec. 140, and note; *Hills v. Sherwood*, 48 Cal. 392; *Forde v. Exempt F. Co.*, 50 Cal. 299; *Parker v. Flagg*, 127 Mass. 30; *Bushnell v. Bushnell*, 88 Ind. 403; *German Bank v. Leysor*, 50 Wis. 258. As to assignees: *Spring v. Short*, 90 N. Y. 538; *Waters v. Dashiell*, 1 Md. 455; *Simpson v. Warren*, 55 Me. 18; *Shipman v. Aetna Ins. Co.*, 29 Conn. 245; *Staton v. Pittman*, 11 Gratt. 99; *Doyle v. Peckham*, 9 R. I. 21; *Tams v. Bullit*, 35 Pa. St. 308; *Kilbourne v. Fay*, 29 Ohio St. 284. The power is denied to executors and administrators in *Snodgrass v. Andrews*, 30 Miss. 472, 64 Am. Dec. 169; *George v. Williamson*, 26 Mo. 190, 72 Am. Dec. 203; *Blake v.*

the decedent was entitled to maintain a creditors' suit, this right necessarily passes to his administrator, who may assert it both for the benefit of the heirs and of the creditors. If an administrator, who is liable to the estate makes a fraudulent transfer of his property, an administrator de bonis non, subsequently appointed, may maintain a creditors' suit for the purpose of reaching the property so fraudulently transferred to the extent of satisfying the sum due from his predecessor in office.<sup>177</sup> If, however, it was the decedent who was guilty of a fraudulent transfer, he is bound thereby, and so are his heirs; and his executor or administrator, in so far as he represents the heirs, has no more right than they to assail any transfer of the decedent as fraudulent. If it appears that the estate is indebted and the indebtedness cannot be paid, except by recovering for the benefit of the estate property fraudulently transferred, the administrator or executor is, in most of the states, entitled to maintain a creditors' bill to reach such property to the extent necessary to satisfy such creditors as may have presented and procured the allowance of their demands, and who themselves would be entitled to proceed against such property but for the death of their debtor.<sup>178</sup> Whether, under such circumstances, the creditors themselves may maintain a suit is in doubt. In Massachusetts, it has been held that they cannot; that the suit must

Blake, 53 Miss. 193; *Merry v. Fremon*, 44 Mo. 522; *Davis v. Swanson*, 54 Ala. 277, 25 Am. Rep. 678. And to assignees under voluntary assignments, in *Pillsbury v. Kingon*, 31 N. J. Eq. 619; *Brownell v. Curtis*, 10 Paige, 210; *Sere v. Pitot*, 6 Cranch, 332; *Estabrook v. Messersmith*, 18 Wis. 545; *Flower v. Cornish*, 25 Minn. 473.

<sup>177</sup> *Duffy v. State*, 115 Ind. 351; *Harvey v. State*, 123 Ind. 260.

<sup>178</sup> *Field v. Andrada*, 106 Cal. 107; *Ohm v. Superior Court*, 85 Cal. 545, 20 Am. St. Rep. 245; *Majorowicz v. Payson*, 153 Ill. 484; *Gibson v. Hutchinson*, 120 Mass. 27.

be brought by the administrator, and that if he refuses, upon proper demand, to bring it, the remedy is to apply for the revocation of his authority and the appointment of one in his stead to take proper action.<sup>179</sup> In California, on the other hand, it has been held that the creditors may maintain the suit on their own behalf, for the reason that the failure of the administrator to act does not seem to be a statutory cause for his removal, and that the rule is especially applicable when he is himself the fraudulent grantee.<sup>180</sup>

**§ 432. Joinder of Parties Plaintiff, and the Rights of Creditors not Joined.**—At the present time, a creditor entitled to maintain a suit as such may sue for himself alone, or for himself and all other persons similarly situated.<sup>181</sup> All persons having the right to sustain a creditor's suit may join in one action, although their liens are entirely distinct, and neither has any interest in the claim of the other.<sup>182</sup> And where, by statute, simple contract creditors are entitled to maintain such

<sup>179</sup> *Putney v. Fletcher*, 148 Mass. 247.

<sup>180</sup> *Emmons v. Barton*, 109 Cal. 667.

<sup>181</sup> *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97; *State v. Foot*, 27 S. C. 340.

<sup>182</sup> *Brown v. Dimmock*, 10 Ala. 432; *Chapman v. B. & T. Co.*, 128 Mass. 478; *Gibson v. Trowbridge F. Co.*, 93 Ala. 579; *Elliott v. Pontius*, 136 Ind. 641; *Gamet v. Simmons*, 103 Ia. 163; *Bomar v. Means*, 37 S. C. 520, 34 Am. St. Rep. 772; *Banknight v. Sloan*, 17 Fla. 286; *Clarkson v. De Peyster*, 3 Paige, 320; *Dewey v. Moyer*, 72 N. Y. 74; *Lentilhon v. Moffat*, 1 Edw. Ch. 451; *Sizer v. Miller*, 9 Paige, 605; *Lore v. Getsinger*, 3 Halst. Eq. 191; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Conro v. P. H. I. Co.*, 12 Barb. 27; *Gates v. Boomer*, 17 Wis. 455. A misjoinder or nonjoinder of parties plaintiff, in a creditor's bill, should be objected to by answer or demurrer; otherwise, it will be treated as waived. *Fort Stanwix Bank v. Leggett*, 51 N. Y. 552; *Colgin v. Redman*, 20 Ala. 650. The creditors may join in a suit with a sheriff, or with an assignee in bankruptcy. *Adams v. Davidson*, 10 N. Y. 309; *Boone v. Hall*, 7 Bush, 66.



suits, they and judgment creditors may join therein.<sup>183</sup> It was formerly customary for a creditor's bill to be brought either by all the creditors entitled to bring such a bill, or else by one creditor professing to proceed in behalf of himself and all other persons similarly situated. Whether the plaintiff professed to proceed in behalf of others or not, his bill was said to be necessarily for the benefit of all the creditors, and they were allowed, at any time before the final distribution of the funds realized, to make themselves parties to the suit, and to prove their claims and share in the proceeds.<sup>184</sup> But it is now the more usual practice for the plaintiff to sue, not only in his own name, but also for his sole benefit. If he is a judgment creditor, he may certainly do this;<sup>185</sup> and we shall hereafter show that he thereby acquires the right to be first satisfied out of the property subjected to his suit. In Alabama, if the complainant is seeking "in equity to subject lands descended or devised, he must sue in behalf of himself and all other creditors."<sup>186</sup>

Some confusion of understanding with respect to the

<sup>183</sup> *Steiner L. & L. Co. v. King*, 118 Ala. 546; *Steiner v. Parker*, 108 Ala. 357.

<sup>184</sup> *Strike v. McDonald*, 2 Har. & G. 191; *Strike's Case*, 1 Bland Ch. 57; *Maccubin v. Brown*, 1 Bland Ch. 410; *Bank v. Dugan*, 2 Bland Ch. 254; *Wilder v. Keeler*, 3 Paige, 167, 23 Am. Dec. 781; *Angel v. Hadden*, 1 Madd. 529; *Gillespie v. Alexander*, 3 Russ. 130; *Brooks v. Gibbons*, 4 Paige, 374; *Shubrick v. Shubrick*, 1 McCord Ch. 406; *Kinney v. Harvey*, 2 Leigh, 70, 21 Am. Dec. 597; *Thompson v. Brown*, 4 Johns. Ch. 619; *Martin v. Tidwell*, 36 Ga. 332. Those who claim to come in to share the benefits of a suit must have been entitled to file a bill themselves. *Parmelee v. Egan*, 7 Paige, 610.

<sup>185</sup> *Elmore v. Spear*, 27 Ga. 193, 73 Am. Dec. 729; *Wakeman v. Grover*, 4 Paige, 23; *Baker v. Bartol*, 6 Cal. 483; *Edmeston v. Lyde*, 1 Paige, 637, 19 Am. Dec. 454; *Lentilhon v. Moffat*, 1 Edw. Ch. 451; *Hammond v. H. R. I. & M. Co.*, 20 Barb. 378; *Ballentine v. Beall*, 8 Scam. 203.

<sup>186</sup> *Scott v. Ware*, 64 Ala. 174.

right of persons other than the original complainant to share in the proceeds of his recovery has resulted from the use of the term "creditors' suits" to characterize proceedings differing widely in their nature and object. Originally, the purpose of these suits was to secure the proper administration of a fund in which many persons were interested and in which all were entitled to share, and no one of them obtained any priority of right by first instituting his suit. Thus, for the purpose of compelling the better administration of the estate of a decedent in the hands of an executor or administrator, or of a bankrupt or insolvent in the hands of an assignee, or of compelling the enforcement of the liability of the stockholders of an insolvent corporation, and the application of the proceeds to the payment of its debts, a suit might be brought, but it accomplished no more than to compel an executor, or administrator, or an assignee for the benefit of creditors, or the officers of the corporation to do what ought to have been done in the absence of such suit. Hence, in these and perhaps some other cases of a similar nature, no special priority of right was acquired by the complainant, and what he did necessarily redounded to the advantage of other creditors similarly situated.<sup>187</sup> If suits are brought by a creditor to discover property not otherwise known, or to set aside fraudulent transfers, or to subject property to execution which is not so subject to law, it is not equitable to compel him to share the fruits of his diligence with others. It is true that there are courts which have declared that, upon ascertaining that a transfer was made in fraud of creditors, it should be disregarded in

<sup>187</sup> *Baker v. Kinnauld*, 94 Ky. 5; *Johnston v. Markle P. Co.*, 153 Pa. St. 196; *Beverly v. Rhodes*, 86 Va. 415.

so far as they are concerned, and the property subject thereto should be treated as assets in the possession of the court for the satisfaction of all the creditors, and hence such courts insist that one creditor cannot maintain a suit in behalf of himself alone, if other creditors choose to come in at any time before the final distribution of the fund and prove their claims and demand their share of such assets.<sup>188</sup> These decisions necessarily conflict with the generally established rule, that one who prosecutes a creditors' suit thereby creates an equitable lien in his favor, unless he professes to proceed in behalf of himself and others, of which lien he cannot be deprived by other creditors, though they seek to join him in the prosecution of the suit or in the distribution of the proceeds.<sup>189</sup> It is even doubtful whether, though a complainant consent, one not a party to a suit can be permitted to share its fruits or to enforce his equities therein, as against the opposition of the defendants when the bill was filed in favor of a single plaintiff.<sup>190</sup> The cases in New Jersey in which a creditors' bill must be regarded as filed for the benefit of persons other than the complainants, were thus enumerated in a recent decision: "That class of creditors' bills in which suit can properly be said to be necessarily brought for the benefit of other creditors beside the complainant comprises those which seek to reach, establish, and administer assets in the hands of a trustee who holds them either voluntarily, or, by force of circumstances, involuntarily, for the benefit of all the creditors. They may be classed as follows:

<sup>188</sup> *Doherty v. Holliday*, 137 Ind. 282; *Curlee v. Rembert*, 87 S. C. 214; *Gracey v. Davis*, 3 Strob. Eq. 58, 51 Am. Dec. 663.

<sup>189</sup> *Senter v. Williams*, 61 Ark. 189, 54 Am. St. Rep. 200; *post*, § 434.

<sup>190</sup> *lauch v. de Socarras*, 56 N. J. Eq. 527.

First. Suits to administer the estate of a decedent held by an executor or administrator, and apply the same to the payment of his debts. Second. Where a living creditor voluntarily assigns property to a trustee for the benefit of his creditors, and a creditor seeks to have that trust administered. Third. Where there is an assignment by operation of law for the equal benefit of the creditors, such as occurred in all instances of attachments against foreign or absconding debtors under our statute until the recent change in that respect. Fourth. Cases where a creditor of a corporation seeks to reach unpaid subscriptions of stock, as in *Wetherbee v. Baker*, 8 Stew. Eq. 501; and see *Mallory v. Kilpatrick*, 9 Dick. Ch. Rep. 50. Fifth. A creditors' bill under our chancery act (§§ 88, 94), in which equitable assets are reached by a receiver, and are all subject to the debts of the defendant, but are not distributed *pari passu*, and the complainant first paid. As to this class of cases, see *Whitney v. Robbins*, 2 C. E. Green, 360. In all these cases the property reached becomes assets in the hands of the court, to be distributed among the creditors either equally or with certain priorities." <sup>191</sup>

§ 433. Parties Defendant.—We apprehend that every person who is subject to be sued in the courts of the state or country may be made a party defendant in a creditors' suit, if his presence as such party is essential to a determination of the issues involved or to the power of the court to afford complete relief upon the facts alleged.<sup>192</sup> With respect to municipal corporations, there is a difference of opinion resulting from

<sup>191</sup> *Ianch v. de Socarras*, 56 N. J. Eq. 524.

<sup>192</sup> *Adams v. Cross W. P. Co.*, 27 Ill. App. 813.

the claim that moneys owed by them to their creditors are in custody of the law, and therefore not subject to execution. Where this view prevails, a creditors' suit cannot be maintained against a municipal corporation for the purpose of reaching debts due from it to the judgment debtor;<sup>193</sup> but this is rather an affirmation that the property in question is not subject to execution than an assertion that, in a proper case, those corporations may not be made parties defendant.

In a suit to remove a fraudulent conveyance, the grantor must be a party defendant.<sup>194</sup> If he has died, then his administrator should be made a party;<sup>195</sup> and if no administrator has been appointed, it is probable that no action can be taken until an appointment has been made.<sup>196</sup> But if the grantor parted with all legal and equitable interest in the property, it is difficult to perceive why he, if living, or his heirs or representatives, if he is dead, are necessary parties. It is true that it is his transfer that is sought to be declared void. But this declaration does not injuriously affect him.

<sup>193</sup> *Addyston etc. Co. v. City of Chicago*, 170 Ill. 580; *Memphis v. Laski*, 65 Tenn. 511; contra, *Hinsdale D. G. Co. v. Tilley*, 10 Biss. 572.

<sup>194</sup> *Lovejoy v. Irelan*, 17 Md. 525, 79 Am. Dec. 667; *Beardsley S. Co. v. Foster*, 36 N. Y. 561; *Gaylords v. Kelshaw*, 1 Wall. 81; *Lawrence v. Bank*, 35 N. Y. 320; *Sewall v. Russell*, 2 Paige, 175; *Johnson v. Huber*, 134 Ill. 511.

<sup>195</sup> *Johnson v. Huber*, 134 Ill. 511; *Bump on Fraudulent Conveyances*, p. 522, citing *Peaslee v. Barney*, 1 D. Chip. 331, 6 Am. Dec. 743; *Chamberlayne v. Temple*, 2 Rand. 384; *Simpson v. Simpson*, 7 Humph. 275; *Pharis v. Leachman*, 20 Ala. 662; *McDowell v. Cochran*, 11 Ill. 31; *Barton v. Bryant*, 2 Ind. 189; *Cobb v. Norwood*, 11 Tex. 556; *Snodgrass v. Andrews*, 30 Miss. 472, 64 Am. Dec. 169. But see *Merry v. Fremon*, 44 Mo. 518; *Dockray v. Mason*, 48 Me. 178; *Cornell v. Radway*, 22 Wis. 260; *Jackson v. Forrest*, 2 Barb. Ch. 576.

<sup>196</sup> *Bachman v. Sepulveda*, 39 Cal. 688; *Scriven v. Bostick*, 2 McCord Ch. 410. Contra, *Bireley v. Staley*, 5 Gill & J. 432, 25 Am. Dec. 803.

Except so far as the judgment may impute to him the character of one who is guilty of a fraud, he is indifferent as to the result. Hence a growing tendency to hold that neither he nor his heirs or representatives are necessary parties.<sup>197</sup> If the grantor has been adjudged a bankrupt, and an assignee of his estate has been appointed, he need not be a party defendant in a suit to vacate a transfer made by him. The assignee sufficiently represents his title and interest.<sup>198</sup>

The grantee is a necessary party, and where there are two or more grantees, they should all be parties.<sup>199</sup> As a general rule, all persons whose interests would be prejudiced by the granting of the relief sought by the bill should be made defendants.<sup>200</sup> Hence persons claiming liens against the grantee, by judgment or otherwise, should be made parties.<sup>201</sup> If a lien exists which is paramount to the rights of the complainant, and which he does not seek to disturb or impair by his suit, he may be allowed to proceed without making the lienholder a party.<sup>202</sup> This rule must be applicable when, though the judgment is against a decedent, the maintenance of a creditors' suit cannot prejudice

<sup>197</sup> *Potter v. Phillips*, 44 Iowa, 357; *Jackman v. Robinson*, 64 Mo. 289; *Taylor v. Webb*, 54 Miss. 36; *Dockray v. Mason*, 48 Me. 178; *Zoll v. Soper*, 75 Mo. 462; *Coffey v. Norwood*, 81 Ala. 512; *Blanc v. Paymaster M. Co.*, 95 Cal. 524, 29 Am. St. Rep. 149.

<sup>198</sup> *Buffington v. Harvey*, 95 U. S. 103.

<sup>199</sup> *Gray v. Schenck*, 4 N. Y. 460; *Ward v. Hollins*, 14 Md. 158; *Sage v. Mosher*, 28 Barb. 287; *Towle v. Janvrin*, 61 N. H. 605.

<sup>200</sup> *Suckley v. Rotchford*, 12 Gratt. 60, 65 Am. Dec. 240; *Sexton v. Crockett*, 23 Gratt. 857; *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190; *Copous v. Kauffman*, 8 Paige, 583; *Bowen v. Gent*, 54 Md. 555; *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 149; *Hamilton N. B. v. Halsted*, 56 Hun, 530.

<sup>201</sup> *Hoffman v. Shields*, 4 W. Va. 490; *Snider v. Brown*, 3 W. Va. 143; *Williams v. Michenor*, 3 Stock. 520; *Rountree v. McKay*, 6 Jones Eq. 87.

<sup>202</sup> *Hagan v. Walker*, 14 How. 29.

his creditors, as where he has effected an insurance on his life, payable to his heirs. Under such circumstances, if the executor or administrator has no interest in the moneys recoverable under the policy, he need not be made a party defendant to a creditors' suit seeking to reach them.<sup>203</sup> Hence, if the object of the bill is merely to reach a mortgagor's equity of redemption, the mortgagees need not be made parties.<sup>204</sup> If there are several cojudgment debtors, they should all be joined as defendants in a creditors' bill,<sup>205</sup> unless it is shown that some of them are insolvent, and that their joinder would be useless.<sup>206</sup> To reach an interest in lands held by the defendant under a contract of sale, the vendor, if he be living, or his heir or administrator, if he be dead, must be made parties.<sup>207</sup> If the real estate of a deceased defendant is primarily liable, his heirs may be made parties, and his administrator omitted.<sup>208</sup> On the death of a defendant pending the suit, his heirs and devisees should be made parties before proceeding to a decree.<sup>209</sup> On a creditor's bill, to reach the interest of an heir and have it applied to the payment of a judgment against him, the administrator need not be made a party.<sup>210</sup> Holders of property acquired by several distinct conveyances fraudulently made by the same grantor may all be joined as

<sup>203</sup> *Tompkins v. Levy*, 87 Ala. 263, 13 Am. St. Rep. 81.

<sup>204</sup> *Wessel v. Brown*, 10 Lea, 685.

<sup>205</sup> *Child v. Brace*, 4 Paige, 309; *Commercial Bank v. Meach*, 7 Paige, 449; *Thomas v. Adams*, 30 Ill. 37; *Bennett v. McGuire*, 58 Barb. 625; 5 Lans. 183.

<sup>206</sup> *Williams v. Hubbard*, 1 Mich. 446; *Van Cleef v. Sickels*, 2 Edw. Ch. 392.

<sup>207</sup> *McNab v. Heald*, 41 Ill. 326.

<sup>208</sup> *Gary v. May*, 16 Ohio, 66.

<sup>209</sup> *Sexton v. Crockett*, 23 Gratt. 857.

<sup>210</sup> *McArthur v. Hoysradt*, 11 Paige, 495.

defendants in the suit to vacate such conveyances.<sup>211</sup> In New York, the administrator and the heirs of a deceased person cannot be joined as parties defendant.<sup>212</sup> In a suit to set aside an assignment made for the benefit of creditors, it is said that they need not be made parties defendant.<sup>213</sup> The judgment debtor,<sup>214</sup> or in the event of his death his executor or administrator,<sup>215</sup> should be a party defendant. If the proceeding is to reach real estate, his heirs and devisees cannot be affected by it, unless made parties.<sup>216</sup> All persons claiming as grantees or encumbrancers must be made parties defendant if the complainant desires their claim to be treated as subordinate to his.<sup>217</sup> If the suit is to reach property fraudulently transferred, the fact that the claims of these persons are separate and distinct, as where they assert title in severalty to different parcels of land, does not render their union as defendants a

<sup>211</sup> *Boyd v. Hoyt*, 5 Paige, 65; *Morton v. Well*, 33 Barb. 30; 11 Abb. Pr. 421; *Hamlin v. Wright*, 23 Wis. 491; *Chase v. Searles*, 45 N. H. 511; *Pierson v. David*, 1 Iowa, 23; *Reed v. Stryker*, 12 Abb. Pr. 47; 4 Abb. App. 26; *Brinkerhoff v. Brown*, 6 Johns. Ch. 139; *Newbould v. Warrin*, 14 Abb. Pr. 80; *North v. Bradway*, 9 Minn. 183; *Planters' Bank v. Walker*, 7 Ala. 926; *Fellows v. Fellows*, 4 Cow. 682, 15 Am. Dec. 412; *Hammond v. H. R. I. M. Co.*, 20 Barb. 378; *Wade v. Rusher*, 4 Bosw. 537.

<sup>212</sup> *Butts v. Genung*, 5 Paige, 254.

<sup>213</sup> *Therasson v. Hickok*, 37 Vt. 454; *Grover v. Wakeman*, 11 Wend. 187, 25 Am. Dec. 624; *Irwin v. Keen*, 3 Whart. 347; *McKinley v. Combs*, 1 T. B. Mon. 105; *Bank of N. A. v. Suydam*, 1 Code R., N. S., 325; 6 How. Pr. 379.

<sup>214</sup> *Lawrence v. Bank*, 35 N. Y. 320; *Miller v. Hall*, 70 N. Y. 252; *Gaylords v. Kelshaw*, 1 Wall. 81; *Sewall v. Russell*, 2 Paige, 175; *Lovejoy v. Irelan*, 17 Md. 525, 79 Am. Dec. 667.

<sup>215</sup> *Allen v. Vestal*, 60 Ind. 245; *Boggs v. McCoy*, 15 W. Va. 344; *Bachman v. Sepulveda*, 39 Cal. 688.

<sup>216</sup> *McNab v. Heald*, 41 Ill. 326; *Gary v. May*, 16 Ohio, 66; *Sexton v. Crockett*, 23 Gratt. 857.

<sup>217</sup> *Gray v. Schenck*, 4 N. Y. 460; *Ward v. Hollins*, 14 Md. 158; *Tichenor v. Allen*, 13 Gratt. 15; *Bowen v. Gent*, 54 Md. 555.



misjoinder. If they are all affected by the fraudulent transfer, it is a common bond of union from which they cannot escape, and the complainant may pursue them jointly as well as severally.<sup>218</sup>

It is scarcely necessary to remark that, as to persons properly made defendants in a creditors' suit, they are entitled to interpose every defense tending to show that no relief should be granted as against them, and if their equities are equal or superior to those of the complainant, he cannot prevail.<sup>219</sup> They may, if necessary, assert their equities by cross-bills, and in addition to meeting the case as sought to be made by the complainants, may urge affirmative causes of complaint existing in their favor, and obtain relief thereon.<sup>220</sup>

**§ 434. The Lien Acquired by a Creditor's Bill.**—Upon a bill filed by a simple contract creditor he obtains no right to priority in the distribution of the fund reached by the bill.<sup>221</sup> In Alabama, Tennessee, and Virginia, the statutes empowering simple contract creditors to maintain creditors' suits place them on the same footing as judgment creditors, and therefore entitle them to a lien by virtue of the prosecution of the suit when a judgment creditor is so entitled.<sup>222</sup> The existence

<sup>218</sup> *Brady v. McCosker*, 1 N. Y. 214; *Williams v. Neel*, 10 Rich. Eq. 338, 73 Am. Dec. 94; *Chase v. Searles*, 45 N. H. 519; *Trego v. Skinner*, 42 Md. 432; *De Wolf v. Sprague Mfg. Co.*, 49 Conn. 282; *Welsh v. Welsh*, 105 Mass. 229; *Donnovan v. Dunning*, 69 Mo. 436.

<sup>219</sup> *Brannin v. Broaddus*, 94 Ky. 33; *Cole v. Lee*, 45 N. J. Eq. 779.

<sup>220</sup> *Alabama etc. S. Co. v. McKeever*, 112 Ala. 134; *Sharp v. Hicks*, 94 Ga. 624; *Stubendorf v. Hoffman*, 23 Neb. 360; *Clark v. Figgins*, 31 W. Va. 156, 13 Am. St. Rep. 860; *Casto v. Greer*, 44 W. Va. 332.

<sup>221</sup> *Day v. Washburn*, 24 How. 352; *Robinson v. Stewart*, 10 N. Y. 189; *Barton v. Bryant*, 2 Ind. 189; *McNaughton v. Lamb*, 2 Ind. 642; *In re Spragina*, 44 S. C. 65; *Talley v. Curtain*, 54 Fed. Rep. 43.

<sup>222</sup> *Evans v. Welch*, 63 Ala. 250; *Brooks v. Gibson*, 7 Lea. 271; *Davis v. Bonney*, 89 Va. 755; *Wallace v. Treakle*, 27 Gratt. 479.

of the lien in favor of the complainant in a creditors' suit is not universally conceded. Thus, the pendency of such a suit, under the statutes of Massachusetts, neither creates a lien on the property subject thereto, nor prevents alienations thereof pendente lite.<sup>223</sup> It has elsewhere been held that a suit to reach property transferred in fraud of creditors brought such property within the control of the court, which would distribute it among all creditors of the defendant without giving any preference in favor of him who had brought the suit, though he did not profess to sue for the benefit of any but himself.<sup>224</sup>

Whatever may have been the rule sustained by the earlier decisions, it is now settled by a decided preponderance of the authorities in this country that one entitled to maintain a creditors' suit is not compelled to proceed on behalf of other creditors, but may act for himself alone, and, by so doing, he may create a lien in favor of himself when his suit is either to reach assets not subject to execution at law or to remove fraudulent transfers from property liable to execution. In either of these contingencies, the judgment creditor who first institutes a suit and serves his subpoena, or otherwise entitles himself to the benefit of the law of *lis pendens*, obtains a lien upon the assets which his bill seeks to reach. Upon obtaining a decree, he is entitled to the fruits of his diligence, irrespective of *pendente lite* alienations or encumbrances.<sup>225</sup> The fil-

<sup>223</sup> *Trow v. Lovett*, 122 Mass. 570; *Squire v. Lincoln*, 187 Mass. 390; *Powers v. Raymond*, 137 Mass. 483; *Fish v. Fiske*, 154 Mass. 302; *Titcomb v. Bradley*, 159 Mass. 190.

<sup>224</sup> *Doherty v. Holliday*, 137 Ind. 282; *Gracey v. Davis*, 8 Strob. Eq. 58, 51 Am. Dec. 663; *Curlee v. Rembert*, 37 S. O. 214.

<sup>225</sup> *Jeffres v. Cochrane*, 48 N. Y. 671; *Roberts v. A. & W. S. R. R. Co.*, 25 Barb. 662; *United States Bank v. Burke*, 4 Blackf. 141;

ing of the bill and the service of process are, in equity, equivalent to a levy upon the property.<sup>226</sup> If several creditors' bills are filed at different times, they are entitled to priority in the order of their filing.<sup>227</sup> To create a lien, it is probably essential that the property sought to be reached be described in the bill so definitely that one reading it is chargeable with notice of such property, and if it is not sufficient in this respect, and hence must be amended, the lien cannot antedate the amended bill.<sup>228</sup>

Other creditors cannot participate in the funds realized until after the complainant has been satisfied.<sup>229</sup>

*George v. Williamson*, 26 Mo. 190, 72 Am. Dec. 203; *Dargan v. Waring*, 11 Ala. 988, 46 Am. Dec. 234; *Scott v. Coleman*, 5 T. B. Mon. 78; *Newdigate v. Lee*, 9 Dana, 20; *Harrison v. Battle*, 1 Dev. Eq. 541; *McCalmont v. Lawrence*, 1 Blatchf. 232; *Weed v. Smull*, 3 Sand. Ch. 273; *Stanton v. Keyes*, 14 Ohio St. 443; *Bridgman v. McKissick*, 15 Iowa, 260; *Pullis v. Robison*, 73 Mo. 201, 39 Am. Rep. 497; *Brooks v. Gibson*, 7 Lea, 271; *Petway v. Hoskins*, 12 Lea, 107; *Beck v. Burdett*, 1 Paige, 305, 19 Am. Dec. 436; *Miller v. Sherry*, 2 Wall. 249.

<sup>226</sup> *Storm v. Waddell*, 2 Sand. Ch. 494; *Clarkson v. De Peyster*, 3 Paige 320; *Cummings v. McCullough*, 5 Ala. 324; *Gracey v. Davis*, 3 Strob. Eq. 55, 51 Am. Dec. 663; *Utica Ins. Co. v. Power*, 3 Paige, 365; *Bloodgood v. Clark*, 4 Paige, 574; *Stanton v. Keyes*, 14 Ohio St. 443; *Malders v. Culver*, 1 Duvall, 164; *Ames v. Blunt*, 5 Paige, 13; *Weed v. Pierce*, 9 Cow. 722; *Albany C. B. v. Schermerhorn*, Clarke Ch. 297; *Miller v. Sherry*, 2 Wall. 238; *Farnham v. Campbell*, 10 Paige, 598; *Chittenden v. Brewster*, 2 Wall. 191; *Werborn's Ad. v. Kahn*, 93 Ala. 201; *Talcott v. Grant W. Co.* 131 Ill. 248; *Russell v. Chicago T. & S. B.*, 139 Ill. 538; *Davidson v. Burke*, 143 Ill. 139, 36 Am. St. Rep. 367; *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917; *Union N. B. v. Lane*, 177 Ill. 171, 70 Am. St. Rep. 216; *Lane v. Union N. B.*, 75 Ill. App. 299; *Ware v. Delahaye*, 95 Ia. 667; *Kitchen v. Lowery*, 127 N. Y. 53; *Boorum & P. Co. v. Armstrong* (Tenn. Ch. App.), 37 S. W. 1095; *Cole v. Terrell*, 71 Tex. 549; *Sweeney v. Sugar R. Co.*, 30 W. Va. 443, 8 Am. St. Rep. 88; *Bragg v. Gaynor*, 85 Wis. 468.

<sup>227</sup> *Brooks v. Wilson*, 53 Hun, 173.

<sup>228</sup> *Boorum & P. Co. v. Armstrong* (Tenn. Ch. App.), 37 S. W. 1095.

<sup>229</sup> *Boynton v. Rawson*, 1 Clarke Ch. 584; *Hone v. Henriques*, 18 Wend. 240, 27 Am. Dec. 204; *Fields v. Sands*, 8 Bosw. 685; *Bridg-*

"The lien is given by the court in the exercise of its jurisdiction to entertain the bill and to grant the relief prayed for; and to distribute the proceeds of the sale for the benefit of others, equally with the execution creditor first filing the bill, would be to contradict the very principle of the jurisdiction itself, and defeat the very remedy it promised; for the fruits of litigation, according to the rule of equality, would have to be divided, not only with other judgment and execution creditors but, as well, with all creditors whether their claims had been reduced to judgment or not."<sup>230</sup>

If property consists of chattels subject to execution at law, so that the plaintiff can levy his writ thereon, it is not, before it vests in the receiver, so bound by a bill that it cannot be levied and sold under an execution issued by another creditor.<sup>231</sup> Property acquired by the defendant subsequently to the filing of the bill is not bound by it.<sup>232</sup> And the general declaration is sometimes made that no lien can be acquired by a creditor's bill except when the creditor cannot acquire a lien at law.<sup>233</sup> At all events where, prior to the filing of a bill, a person has a legal lien on the property,

man v. McKissick, 15 Iowa, 260; Gordon v. Lowell, 21 Me. 251; Lyon v. Robbins, 46 Ill. 276; McDermutt v. Strong, 4 Johns. Ch. 687; Corning v. White, 2 Paige, 566, 22 Am. Dec. 659; Fitch v. Smith, 10 Paige, 9; Hammond v. H. R. I. & M. Co., 20 Barb. 378; Burrell v. Leslie, 6 Paige, 445; Senter v. Williams, 61 Ark. 189, 54 Am. St. Rep. 200; Puget Sound N. B. v. Levy, 10 Wash. 499, 45 Am. St. Rep. 803; ante, § 432.

<sup>230</sup> Freedman's S. & T. Co. v. Earle, 110 U. S. 710.

<sup>231</sup> First Nat. Bank v. Gage, 93 Ill. 172; Bowry v. Odell, 4 Ohio St. 623; Lansing v. Easton, 7 Paige, 364; Storm v. Badger, 8 Paige, 130; Storm v. Waddell, 2 Sand. Ch. 494; Van Alstyne v. Cook, 25 N. Y. 489; Becker v. Torrance, 31 N. Y. 631; Davenport v. Kelly, 42 N. Y. 193; Mann v. Pentz, 2 Sand. Ch. 257; First N. B. v. Shuler, 153 N. Y. 163, 60 Am. St. Rep. 601.

<sup>232</sup> First Nat. Bank v. Gage, 93 Ill. 172.

<sup>233</sup> Hubbs v. Bancroft, 4 Ind. 388.

by judgment or otherwise, his lien cannot be impaired by the proceedings in chancery subsequent thereto, and a title derived under his lien is paramount to title derived under a sale authorized by the proceedings in chancery.<sup>234</sup> The antecedent liens of the respective parties remain as before the suit was brought. Hence, if several attachment creditors join in a suit for the purpose of having a pre-existing attachment declared fraudulent and void as against them, a decree granting them the relief prayed for does not affect their priority as among one another. That is still controlled by the dates of the levies of their respective writs.<sup>235</sup> If a bill to set aside a transfer results in declaring that such transfer, though not fraudulent, was not intended to be absolute, but only to stand as security for a debt, this security will not be impaired by the decree.<sup>236</sup> A fraudulent grantee, after a decree is entered against him, is not precluded from purchasing and taking an assignment of the complainant's judgment, in which event the other creditors must concede it precedence in the distribution of the proceeds of the property to the same extent to which it would have been entitled but for such transfer.<sup>237</sup>

<sup>234</sup> *Scouton v. Bender*, 3 How. Pr. 185; *Chautauque Co. Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *St. Louis v. Keane*, 27 Mo. App. 642; *United States etc. L. Co. v. Miller* (Tenn. Ch. App.), 47 S. W. 17; *Craig v. Hope*, 95 Va. 275.

<sup>235</sup> *Bamberger v. Voorhees*, 99 Ala. 292. This rule is elsewhere denied, and it is held that the several attachment creditors, by pooling their claims and joining in a common suit, waive their priorities, and hence are entitled to share in the property recovered in proportion to the amount of the debts held by them respectively and secured by their attachments. *Craig v. California V. Co.*, 80 Or. 43.

<sup>236</sup> *Fenton v. Morgan*, 16 Wash. 30.

<sup>237</sup> *Daisy R. M. Co. v. Ward*, 6 N. D. 317.

Some difficulty may be experienced in applying the rule, that creditors' suits do not supplant pre-existing liens to the lien of judgments as against lands transferred in fraud of creditors. They have a right to levy executions and to proceed to sell such lands as if such transfers had not been made, and the right to sell lands under a judgment usually carries with it the right to have the judgment operate as a lien. It has hence been held in at least one state that a judgment rendered against a fraudulent grantor, after the execution of his grant, is a lien on the property described therein.<sup>238</sup> In another state, precisely an opposite conclusion has been reached. Hence, it is there held that the judgment creditor first filing his bill obtains priority over other judgment creditors irrespective of the dates of their several judgments, provided all were rendered after the fraudulent transfer, and where, therefore, the fraudulent grantor did not appear to have any interest in the property.<sup>239</sup> When, however, the existence of a lien by judgment against property transferred in fraud of creditors is affirmed, it must follow that if a subsequent judgment creditor prosecutes a suit as such, and procures the appointment of a receiver therein who sells real property of the judgment debtor, the title of the purchaser is subordinate to that of a purchaser under an execution issued upon the senior judgment, the holder of which was not a party to the creditors' suit. Such suit cannot impair the right of a holder of a prior lien by judgment to proceed at law, nor lessen the effect of an execution sale resulting from his so proceeding.<sup>239a</sup>

<sup>238</sup> *First N. B. v. Maxwell*, 123 Cal. 360, 69 Am. St. Rep. 64.

<sup>239</sup> *Union N. B. v. Lane*, 177 Ill. 171, 69 Am. St. Rep. 216.

<sup>239a</sup> *Chautauque County Bank v. Risley*, 13 N. Y. 369, 75 Am. Dec. 347.

On the death of a defendant, after the bringing of a creditor's suit, and before the appointment of a receiver therein the suit cannot be revived;<sup>240</sup> but the property passes to the administrator of the deceased subject to the creditor's lien.<sup>241</sup> Probably, this rule is inapplicable when the property consists of chattels subject to execution at law; as to these it is generally held that no lien attaches prior to the appointment of a receiver.<sup>242</sup> The creditor's lien is not destroyed by the subsequent institution of proceedings by or against the debtor, under the bankrupt law of the United States. The title of the assignee in bankruptcy is subordinate to the lien acquired by the creditor's bill.<sup>243</sup>

It is essential to the priority of lien of which we have spoken that he who claims it should have sued for himself alone, for if he professes to act for others as well as himself, they are entitled to share in the benefits of his proceeding, and hence his lien is not paramount to theirs.<sup>244</sup> A like result may follow when, though different suits are commenced, all are consolidated and jointly prosecuted for the common benefit.<sup>245</sup> A creditors' suit may be, in effect, prosecuted for the benefit of several creditors, though this does not appear by the

<sup>240</sup> *Mathews v. Neilson*, 3 Edw. Ch. 346.

<sup>241</sup> *Brown v. Nichols*, 9 Abb. Pr., N. S., 1; 42 N. Y. 26; *King v. Goodwin*, 130 Ill. 102, 17 Am. St. Rep. 277; *Gooding v. King*, 30 Ill. App. 169.

<sup>242</sup> *First N. B. v. Shuler*, 153 N. Y. 163, 60 Am. St. Rep. 601.

<sup>243</sup> *Storm v. Waddell*, 2 Sand. Ch. 494; *Watkins v. Pinkney*, 3 Edw. Ch. 533; *Sedgwick v. Menck*, 1 Nat. Bank. Reg. 675; 6 Blatchf. 156; *Smith v. —*, 4 Edw. Ch. 653; *Stewart v. Isidor*, 1 Nat. Bank. Reg. 485; 5 Abb. Pr., N. S., 68; *Carr v. Fearington*, 63 N. C. 560; *Clarke v. Rist*, 3 McLean, 494; *Wooten v. Clark*, 23 Miss. 75; *Fetter v. Cirode*, 4 B. Mon. 482.

<sup>244</sup> *Pennell v. Lamar I. Co.*, 73 Ill. 303; *Younger v. Massey*, 41 S. C. 50; *George v. St. Louis etc. R. Co.*, 44 Fed. Rep. 117.

<sup>245</sup> *Jones v. Fayerweather*, 46 N. J. Eq. 237.

record. If so, the complainant is not entitled to precedence over the others, as where, by agreement between creditors of a common debtor, one of them is permitted to obtain a judgment in advance of the others for the purpose of filing a creditors' bill.<sup>246</sup> Even where suit is brought on behalf of the complainant and others, he may acquire priority over them by their failure, after knowledge of the suit, to offer to participate therein and to share its burdens. They cannot safely stand aloof, and thereby acquire the benefits of the suit while they avoid its perils.<sup>247</sup>

<sup>246</sup> *Talcott v. Grant W. & S. Co.*, 181 Ill. 248.

<sup>247</sup> *Thompson v. Reno S. B.*, 19 Nev. 291; *Williams v. Gibbs*, 17 How. 254.



## **CHAPTER XXXI.**

### **ENJOINING PROCEEDINGS UNDER EXECUTION.**

- § 435.** Injunction will not issue where there is a remedy at law.
- § 436.** Injunctions on account of errors and irregularities.
- § 437.** Injunction to prevent the sale of the property of one person under a writ against another.
- § 437 a.** Injunction to prevent dispossession of one person under a writ against another.
- § 438.** Injunctions to prevent the clouding of titles.
- § 439.** Injunctions to prevent sale of homestead and exempt property.
- § 440.** Compelling particular property to be first sold.
- § 441.** Injunctions in aid of proceedings in bankruptcy.
- § 441 a.** Under the National Bankruptcy Act of 1898.

**§ 435. Injunction will not Issue where there is a Remedy at Law.**—As a judgment is ordinarily harmless until an execution is issued for its enforcement, it very frequently happens that no attempt is made to enjoin the plaintiff from taking full advantage of his judgment until he has taken out his writ and is about to compel satisfaction. Then the defendant's proceeding in equity usually takes the form of an injunction against the present enforcement of the writ, and seeks as its ultimate object to prevent the plaintiff from using his judgment for any purpose whatever. But while a proceeding in equity may seek to restrain the service of an execution, yet the whole ground upon which the plaintiff seeks redress may, and usually does, arise out of the judgment. In such a case the entire litigation may be conducted to a successful issue without any attack being made on the execution and the most perfect regularity in the issue of the execution

and in the subsequent proceedings may be unavailing to defeat the plaintiff's claim for relief. An execution may be enjoined because the judgment ought not to be enforced. But in considering whether it ought to be enjoined for that cause, reference must be had to the law of judgments rather than to the law of executions. The law of judgments is not embraced within the scope of this work. We shall therefore confine ourselves to the consideration of the cases in which executions are sought to be restrained in equity, not for any vice in the judgments on which they are based, but because of vices, either in the execution itself, or in the proceedings which have been or are about to be taken under it. Perhaps all the cases which may be encountered in the investigation of this subject cannot be harmonized. But the general principle which has governed most of them and which ought to govern all, is this: That equity will never interfere except to prevent a wrongful and inequitable act, and then only when the complainant is without any adequate remedy at law.<sup>1</sup> Hence the refusal to enjoin a void judgment, when an adequate remedy exists by motion in the original action.<sup>2</sup> Therefore, whenever it is claimed that a party is entitled to an injunction because of some wrong or irregularity either in the issuing of process or in some act done or threatened thereunder, the first inquiry is, whether he has some adequate remedy at law. If the answer must be affirmative, no injunction can properly issue in his behalf.<sup>3</sup>

<sup>1</sup> *McIndoe v. Hazelton*, 19 Wis. 567, 88 Am. Dec. 701; *Greenup v. Brown*, Breese, 253; *Beard v. Foreman*, Breese, 385; *Imlay v. Carpenter*, 14 Cal. 173; *Garstin v. Asplin*, 1 Madd. 150; *Gunby v. Bell*, 40 Ga. 133; *Macy v. Lloyd*, 23 Ind. 60.

<sup>2</sup> *Luco v. Brown*, 73 Cal. 3; *Partin v. Luterloh*, 6 Jones Eq. 341.

<sup>3</sup> *Triest v. Enslen*, 106 Ala. 180; *Drigg's Bank v. Norwood*, 49 Ark. 136, 4 Am. St. Rep. 30; *Hughes v. Melville*, 60 Ill. App. 419; *Com-*

§ 436. **Injunctions on Account of Errors and Irregularities.**—Equity will not enjoin a judgment on account of mere errors and irregularities in the proceedings not of so serious a character as to render it void.<sup>4</sup> No doubt the same rule applies to proceedings for the purpose of restraining the levy or sale of property under execution. Courts of equity do not presume to exercise supervisory power over courts of law with a view of correcting the decisions of legal tribunals; they interfere only in cases of fraud, accident, mistake, surprise, or where some unconscionable use of a legal right or title is made or threatened. If an execution is irregularly issued, or is being executed in an irregular, oppressive, or fraudulent manner, the court out of which it issued can usually, on motion, grant appropriate and adequate relief; and where it can do so, equity will not interpose,<sup>5</sup> except to stay proceedings until the ordinary means of obtaining redress can be pursued at law. Hence equity has refused to interfere where the writ issued prematurely;<sup>6</sup> where an officer was about to sell without first having an appraisement made;<sup>7</sup> where a levy had been made on personal property without first exhausting defendant's real estate;<sup>8</sup>

*mercantile N. B. v. Stoddard*, 70 Ill. App. 79; *Henderson v. Rainbow*, 76 Ia. 320; *Ricks v. Richardson*, 70 Miss. 424; *Howell v. Thomason*, 84 W. Va. 794.

<sup>4</sup> *Freeman on Judgments*, § 487.

<sup>5</sup> *Lasselle v. Moore*, 1 Blackf. 226; *Gregory v. Ford*, 14 Cal. 138. 73 Am. Dec. 639; *Ammons v. Whitehead*, 31 Miss. 99; *Elliott v. Elmore*, 17 Ohio, 27; *Eyster's Appeal*, 65 Pa. St. 473; *Tooley v. Gridley*, 3 Smedes & M. 493, 41 Am. Dec. 628; *Union I. Works v. Bassick M. Co.*, 10 Colo. 24.

<sup>6</sup> *Dayton v. Com. Bank*, 6 Rob. (La.) 17; *Williams v. Douglass*, 47 La. An. 1277.

<sup>7</sup> *Robinson v. Chesseldine*, 4 Scam. 332. Contra, *Robinson v. Perry*, 4 Tex. 273.

<sup>8</sup> *Farrell v. McKee*, 36 Ill. 225.

where the defendant had been discharged from liability by a decree in bankruptcy;<sup>9</sup> where the judgment on which the writ issued had been reversed;<sup>10</sup> where the writ issued for an excessive amount;<sup>11</sup> or in violation of an agreement to stay execution;<sup>12</sup> or upon a dormant judgment;<sup>13</sup> or the levy is excessive;<sup>14</sup> or the officer is about to sell land under a private judgment, which the statutes of the state do not permit,<sup>15</sup> or personal property exempt from execution;<sup>16</sup> or the defendant desires the postponement of the sale until he can have surveys made and the property platted in subdivisions, to enable the probable realization of a greater price;<sup>17</sup> and where an officer, in the honest exercise of his discretion, had refused to adjourn a sale.<sup>18</sup>

Courts have not been at all harmonious in the disposition which they have made of applications to enjoin proceedings under executions on the ground of irregularities, or because of matters which can be redressed at law. Thus executions have been enjoined because issued on a dormant<sup>19</sup> or lost judgment,<sup>20</sup> or after the death of the plaintiff,<sup>21</sup> or because property was struck off at a price grossly disproportionate to its

<sup>9</sup> *Green v. Thomas*, 17 Cal. 86.

<sup>10</sup> *Fahs v. Roberts*, 54 Ill. 192.

<sup>11</sup> *Triest v. Enslen*, 106 Ala. 180; *Gorusch v. Thomas*, 57 Ind. 334.

<sup>12</sup> *Moulton v. Knapp*, 85 Cal. 385.

<sup>13</sup> *Coward v. Chastain*, 99 N. C. 443, 6 Am. St. Rep. 533.

<sup>14</sup> *Lambeth v. Sentell*, 38 La. An. 691.

<sup>15</sup> *Dunn v. Baxter*, 30 W. Va. 672.

<sup>16</sup> *Bailey v. Wade*, 24 Mo. App. 186.

<sup>17</sup> *Reeves v. Bolles*, 95 Ga. 404.

<sup>18</sup> *Skillman v. Holcomb*, 1 Beas. Ch. 131.

<sup>19</sup> *North v. Swing*, 24 Tex. 193; contra, *Coward v. Chastain*, 99 N. C. 443, 6 Am. St. Rep. 533.

<sup>20</sup> *Cyrus v. Hicks*, 20 Tex. 483.

<sup>21</sup> *Meek v. Bunker*, 33 Iowa, 169.

value by reason of a misunderstanding,<sup>22</sup> or a levy was made in violation of an agreement,<sup>23</sup> or the interest of the defendant, being that of a mortgagee of chattels, the officer had advertised the fee for sale,<sup>24</sup> or the levy was invalid, and the taking of the property seized would greatly diminish the value of that remaining in the possession of the trustee.<sup>25</sup> If the judgment has been satisfied either prior or subsequent to the issue of the execution, the defendant has an adequate remedy by motion to the court, which may quash the writ, or order satisfaction of the judgment to be entered. Hence there is, in ordinary circumstances, no necessity for invoking the aid of equity because the writ has been satisfied; and if unnecessarily invoked, such aid ought to be denied.<sup>26</sup>

When from any cause the person about to be injured by the enforcement of a satisfied judgment has no remedy at law,<sup>27</sup> or when his legal remedy has been exhausted,<sup>28</sup> he may obtain an injunction. If the satisfaction of the judgment is denied, and hence an issue of fact is presented for trial and determination, the remedy by motion, because it does not permit of a regular and advantageous trial of this issue, ought not

<sup>22</sup> *Curran v. Georgia L. & T. Co.*, 104 Ga. 682; *Radzuweit v. Watkins*, 58 Neb. 412; *Hunt v. Fisher*, 29 Fed. Rep. 801.

<sup>23</sup> *Gibson v. McClay*, 47 Neb. 900.

<sup>24</sup> *Stratton v. Packer* (N. J.), 14 Atl. 587.

<sup>25</sup> *Sumner v. Crawford*, 91 Tex. 129.

<sup>26</sup> *Cline v. Low*, 3 Ind. 527; *Gorusch v. Thomas*, 57 Md. 334; *Morrison v. Speer*, 10 Gratt. 228; *Howell v. Thomason*, 34 W. Va. 794; *Marsh v. Haywood*, 6 Humph. 210; *Parker v. Jones*, 5 Jones Eq. 276, 75 Am. Dec. 441; *Hall v. Taylor*, 18 W. Va. 544; *Lansing v. Eddy*, 1 Johns. Ch. 49. Contra, *Harper v. Terry*, 16 La. Ann. 216; *Crawford v. Thurmond*, 3 Leigh, 85.

<sup>27</sup> *Mallory v. Norton*, 21 Barb. 424; *Shaw v. Dwight*, 16 Barb. 536; *McFarland v. Dilly*, 5 W. Va. 135.

<sup>28</sup> *Meyer v. Tully*, 46 Cal. 70.

to be regarded as adequate, and hence the defendant should be allowed to secure relief by an independent suit.<sup>29</sup> A tender of satisfaction refused by the plaintiff entitles the defendant to the remedy by injunction in the same circumstances in which he would be entitled thereto in the event that the amount tendered had been received by the plaintiff.<sup>30</sup> Where the defendant in a judgment in replevin had tendered, and the plaintiff had refused to accept, the property described in the judgment, the latter was enjoined from proceeding under execution to collect the value of the property.<sup>31</sup> He is also entitled to an injunction where property not included in the writ of replevin has been taken from his possession, and is about to be sold.<sup>32</sup>

A plaintiff will be enjoined from making a vexatious use of his writ,<sup>33</sup> or from selling at a time when, on account of pestilence or war, a sale must almost certainly result in a great sacrifice.<sup>34</sup> If property is involved in litigation in a suit of replevin, and is thereby placed in custodia legis, it is not subject to levy under execution, and if levied upon, the sale will be enjoined.<sup>35</sup>

### § 437. To Prevent the Sale of One Person's Property under Execution against Another.--The property of one

<sup>29</sup> *Thompson v. Laughlin*, 91 Cal. 313; *Johnson v. Kitch*, 100 Ind. 30; *Wray v. Chandler*, 64 Ind. 146; *Woodburn v. Friend*, 19 La. An. 496; *McClelland v. Crook*, 4 Md. Ch. 398; *Greenfield v. Hutton*, 1 Baxt. 216; *Harrison M. W. v. Templeton*, 82 Tex. 443.

<sup>30</sup> *Collier v. Sapp*, 49 Ga. 93; *Bowen v. Clark*, 46 Ind. 405; *McClellan v. Marshall*, 19 Ia. 561, 87 Am. Dec. 454.

<sup>31</sup> *McClellan v. Marshall*, 19 Iowa, 561, 87 Am. Dec. 454.

<sup>32</sup> *Brody v. Chittenden*, 106 Ia. 340.

<sup>33</sup> *Colt v. Cornwell*, 2 Root, 109; *Natalle C. Co. v. Ryon*, 188 Pa. St. 138.

<sup>34</sup> *McGown v. Sanford*, 9 Paige, 290.

<sup>35</sup> *Huntington v. Bell*, 2 Port. 51; *Cooper v. Newell*, 36 Miss. 316; *Ryan v. Parris*, 48 Kan. 765.

person may be seized under an execution against another. The question then arises, whether equity will interpose, at the suit of the true owner, for the purpose of preventing a sale and compelling the restoration of the property. We are by no means certain that all the answers which have been given to this question can be harmonized. But the true answer is undoubtedly this: If the title or circumstances of the complainant, or the peculiar character of the property, is such that he has no adequate remedy at law, equity will come to his aid. If, on the other hand, his legal remedy is adequate, he cannot successfully seek redress outside of the common-law courts.<sup>36</sup> Ordinarily, a person whose property is seized under a writ against another may, at law, sustain an action to recover its possession, or if he prefers to do so, he may obtain damages commensurate with its value in an action of trespass or trover. If it consists of real estate, or other property which has not been taken from his possession, he may successfully resist all actions for its recovery, by proving that it was his, and therefore beyond the power of an execution against the judgment debtor. Generally, where he can resort to either of these remedies, equity will not restrain the sale,<sup>37</sup> unless it will

<sup>36</sup> *Bowyer v. Creigh*, 3 Rand. 25; *Allen v. Freeland*, 3 Rand. 170; *Lewis v. Levy*, 16 Md. 85; *Freeland v. Reynolds*, 16 Md. 416.

<sup>37</sup> *Chappell v. Cox*, 18 Md. 513; *Markley v. Rand*, 12 Cal. 275; *Hammon v. St. John*, 4 Yerg. 107; *Du Pre v. Williams*, 5 Jones Eq. 96; *Miller v. Crews*, 2 Leigh, 570; *Sevier v. Ross*, 1 Freem. Ch. 519; *Howell v. Howell*, 5 Ired. Eq. 258; *Rowe v. Cockrell*, 1 Ball. Eq. 126; *Hall v. Davis*, 5 J. J. Marsh. 290; *Coughron v. Swift*, 18 Ill. 414; *Watkins v. Logan*, 3 T. B. Mon. 21; *Bouldin v. Alexander*, 7 T. B. Mon. 425; *Freeman v. Elmendorf*, 3 Halst. Ch. 475, 655; *Johnson v. Conn. Bank*, 21 Conn. 148; *Kenyon v. Clarke*, 2 R. I. 67; *Henderson v. Morrill*, 12 Tex. 1; *Dawes v. Taylor*, 35 N. J. Eq. 40; *D. & I. Co. v. School Trustees*, 35 N. J. Eq. 181; *Taylor's Appeal*, 93 Pa. St. 21; *Baker v. Rinehard*, 11 W. Va. 238; *Allen v. Winstandly*, 135

result in injuries to the complainant not susceptible of pecuniary estimation. If the claimant of the property is a lessor, or from any other cause is not entitled to the immediate possession, he cannot sustain either of the actions at law heretofore mentioned; his legal remedy is regarded as inadequate, and equity will come to his aid.<sup>38</sup> For a like reason, equity will assist a claimant whose title is equitable only.<sup>39</sup>

Sometimes property seized upon is of such special and peculiar value to its owner that he could not, by an action at law, recover damages which would be at all adequate to the injury sustained by its conversion. This is the case with relics, heirlooms, mementoes, and other property having little market value, but inestimable to their owner. Equity, because of the inadequacy of the legal remedy, will compel such property to be restored to its owner.<sup>40</sup> This rule of equity was very frequently and successfully invoked in the southern states, for the purpose of preventing the sale of slaves under executions against persons other than their owners.<sup>41</sup> In some instances, the sale of property under levy has been enjoined because the writ was against a person not the owner, and the owner's busi-

Ind. 105; McCormick v. Riddle, 10 Mont. 467; Lehman v. Roberts, 86 N. Y. 232; Bristol v. Hallyburton, 93 N. C. 384; Gatewood v. Burns, 99 N. C. 357; Bostic v. Young, 116 N. C. 766; Purinton v. Davis, 66 Tex. 455; Mann v. Wallis, 75 Tex. 611; Dunn v. Baxter, 80 W. Va. 672.

<sup>38</sup> Ford v. Rigby, 10 Cal. 449.

<sup>39</sup> Orr v. Griffin, 3 J. J. Marsh. 269.

<sup>40</sup> Lowther v. Lowther, 13 Ves. 95; Arundel v. Phipps, 10 Ves. 140; Nutbrown v. Thornton, 10 Ves. 163; Henderson v. Vaulx, 10 Yerg. 36.

<sup>41</sup> Bell v. Greenwood, 21 Ark. 249; Sanders v. Sanders, 20 Ark. 610; Henderson v. Vaulx, 10 Yerg. 30; Randolph v. Randolph, 6 Rand. 194; Sims v. Harrison, 4 Leigh, 346; Kelly v. Scott, 5 Gratt. 479; McCreery v. Sutherland, 23 Md. 471, 87 Am. Dec. 578; Williams v. Wright, 9 Humph. 493.



ness would be broken up, and his credit ruined, if the sale were allowed to proceed. In such cases, the legal remedy is obviously inadequate.<sup>42</sup> Equity will also restrain a sale when it would create a cloud on the title of the true owner.<sup>43</sup> In Pennsylvania, if the property of a wife is levied upon under an execution against her husband, the sale will be enjoined if her title is conceded.<sup>44</sup> But if her title is denied, the sale will be allowed to proceed, and the question of title left open for settlement in such action as the purchaser may bring against her to recover possession.<sup>45</sup> In Missouri, the right of a wife to appeal to a court of equity for the protection of her separate property against her husband or his creditors is conceded, and she may, therefore, obtain an injunction against its sale on an execution against him.<sup>46</sup> Where the presumption, from the acquisition of title in the name of a married woman, is, that it is community property, and therefore subject

<sup>42</sup> *Watson v. Sutherland*, 5 Wall. 74; *Walker v. Hunt*, 2 W. Va. 491, 98 Am. Dec. 779; *McCreery v. Sutherland*, 23 Md. 471, 87 Am. Dec. 578; *Funk v. Brooklyn G. Co.*, 53 N. Y. Supp. 1086.

<sup>43</sup> See § 438.

<sup>44</sup> *Hunter's Appeal*, 40 Pa. St. 194; *Allen v. Benners*, 30 Leg. Int. 76.

<sup>45</sup> *Winch's Appeal*, 61 Pa. St. 424; *Dyer v. People's Bank*, 31 Leg. Int. 28; *Reeser v. Johnson*, 31 Leg. Int. 384; *Shuster v. Bennett*, 31 Leg. Int. 204; *Scheferling v. Huffman*, 4 Ohio St. 241, 62 Am. Dec. 281. In New Jersey, it has been held that a wife cannot enjoin the sale of her separate property under an execution against her husband, because she has an adequate remedy at law. *Emery v. Vansickel*, 15 N. J. Eq. 144. But in most circumstances, such a sale would cloud the wife's title to her property, and on that account we think she is entitled to an injunction to prevent it from being made. *Calhoun v. Cozens*, 3 Ala. 498; *Smith v. Bank of Wadesborough*, 4 Jones Eq. 304; *Bush v. Bush*, 3 Strob. Eq. 131, 51 Am. Dec. 675; *Alverson v. Jones*, 10 Cal. 12, 70 Am. Dec. 689; *Goldsmith v. Michel*, 19 La. Ann. 272. See, also, *Johnson v. Vail*, 14 N. J. Eq. 423.

<sup>46</sup> *Holthaus v. Hombosth*, 60 Mo. 439.

to execution against her husband, the sale of such property, if it be her separate estate, under a writ against him, must necessarily create a cloud on her title, and she is, therefore, entitled to an injunction to prevent it.<sup>47</sup>

It must be admitted that several decisions in various states are of such a character as to warrant the enjoining of a sale whenever any property has been seized under a writ against a stranger to the title.<sup>48</sup> In Indiana, different rules are applicable to real and to personal property. An owner of realty may, by injunction, prevent the levy thereon or the sale thereof under a writ against another;<sup>49</sup> but the owner of personal property, under like circumstances, is left to his remedy at law.<sup>50</sup>

Whether equity will, in any case, stay a sale of the property of a partnership under an execution against one of the partners, is still an unsettled question. In New York, the early cases answered this question in the negative.<sup>51</sup> More recently, it has been decided, in at least one instance that an injunction ought to issue whenever it is shown that the partner against whom

<sup>47</sup> *Tibbetts v. Fore*, 70 Cal. 242.

<sup>48</sup> *Amis v. Myers*, 16 How. 492; *Wilson v. Butler*, 3 Munf. 559; *Hardy v. Broaddus*, 35 Tex. 668; *Cropper v. Coburn*, 2 Curt. 465. The cases of *McCulloch v. Hollingsworth*, 27 Ind. 115, *Bach v. Goodrich*, 9 Rob. (La.) 391, *Downing v. Mann*, 43 Ala. 266, and *Key City G. L. Co. v. Munsell*, 19 Iowa, 305, all seem to have been decided on the ground that equity will always enjoin an execution sale against a person not the owner of the property. But in each of these cases the execution levied was against a grantor of the complainant. The injunction in each case was, therefore, warranted by the principle stated in the next section.

<sup>49</sup> *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731; *Petry v. Ambroscher*, 100 Ind. 510; *Scobey v. Walker*, 114 Ind. 254.

<sup>50</sup> *Allen v. Winstandley*, 135 Ind. 105.

<sup>51</sup> *Moody v. Payne*, 2 Johns. Ch. 548; *Mowbray v. Lawrence*, 22 How. Pr. 107; 13 Abb. Pr. 317.

the writ issued has, in fact, no interest in the property about to be sold.<sup>52</sup> In Ohio a sale under an execution against one of the partners will be stayed in equity, at the instance of the others, until an accounting can be had and his interest ascertained.<sup>53</sup> A creditor of a partnership who has attached its property is entitled to protection against a precedent judgment or execution against the firm which is, as against his interests, invalid and unenforceable, and should be awarded an injunction to protect the property from such antecedent judgment or writ.<sup>54</sup>

§ 437 a. Injunction to Prevent Dispossessing One Person under a Writ against Another.—The unlawful ejecting of one from his home or lands is, in contemplation of law, an irreparable injury. It is true, he has a remedy by action against the officer to recover the damages sustained. He may also sue in ejectment to recover the possession of which he is unlawfully deprived, or he may proceed by motion in the court whence the writ issued, and procure an order directing restitution to him of whatever has been unlawfully taken from him by the officer.<sup>55</sup> But all these remedies require him to submit to being dispossessed of his land, and to having that possession turned over to a hostile claimant. They are manifestly inadequate. If the writ does not authorize the officer to dispossess him, but the latter nevertheless threatens so to do, an injunction may properly issue to prevent the proposed wrong.<sup>56</sup>

<sup>52</sup> *Turner v. Smith*, 1 Abb. Pr., N. S., 804.

<sup>53</sup> *Place v. Sweetzer*, 16 Ohio, 142; *Sutcliffe v. Dohrman*, 18 Ohio, 181, 51 Am. Dec. 450; *Cropper v. Coburn*, 2 Curt. 465.

<sup>54</sup> *Schuster v. Rader*, 13 Colo. 329.

<sup>55</sup> Post, § 476.

<sup>56</sup> *Williamson v. Russell*, 18 W. Va. 612; *Goodnough v. Sheppard*,

§ 438. Injunctions to Prevent the Clouding of Titles.—Equity will interfere to remove a cloud from the title of the true owner; and whatever it will remove as a cloud after it has been created, equity will, if applied to in proper time, prevent from being created.<sup>57</sup> A sale under execution often constitutes a cloud on the title of the true owner, although he is not a party to the writ. Where a sale which is threatened to be made under execution will, if made, cloud the title of the true owner, he may, by application to equity, prevent the sale from being made.<sup>58</sup> Where a sale, if made, would create a title under which the purchaser could in ejectment recover against the true owner, unless the latter placed his own title in evidence, or by some other means established the invalidity of the purchaser's title, then such sale is a cloud on the title of the true owner.<sup>59</sup> Hence, if an execution against a person who had once been the owner of the property is levied upon it, and it is no longer liable to levy and sale under such execution, the present owner of the property may in equity prevent his title from being clouded

28 Ill. 81; *Springs v. Schenck*, 99 N. C. 551, 6 Am. St. Rep. 552; *Bushong v. Rector*, 32 W. Va. 311, 25 Am. St. Rep. 817.

<sup>57</sup> *Fulton v. Hanlow*, 20 Cal. 484; *Davis v. Clark*, 26 Ind. 424, 89 Am. Dec. 471; *Stevens v. Mulligan*, 167 Mass. 84; *Parks v. People's Bank*, 97 Mo. 130, 10 Am. St. Rep. 295.

<sup>58</sup> *Budd v. Long*, 13 Fla. 288; *McPike v. Pen*, 51 Mo. 63; *Merchants' Bank v. Evans*, 51 Mo. 345; *Oakley v. Trustees*, 6 Paige, 262; *Tear v. Mathews*, *Wright* (Ohio), 371; *Scott v. Onderdonk*, 14 N. Y. 9, 67 Am. Dec. 106; *Bennett v. McFadden*, 61 Ill. 334; *Lirnell v. Battery*, 17 R. I. 243. The cases of *Hart v. Marshall*, 4 Minn. 294; *Montgomery v. McEwen*, 9 Minn. 103; *Armstrong v. Sanford*, 7 Minn. 49; *Drake v. Jones*, 27 Mo. 428; *Kuhn v. McNeil*, 47 Mo. 389—seem to conflict with the general rule.

<sup>59</sup> *Murphy v. Mayor etc. of Wilmington*, 6 Houst. 106, 22 Am. St. Rep. 345; *Wilhoit v. Cunningham*, 87 Cal. 457; *Clifton v. Anderson*, 40 Mo. App. 616; *Van Wyck v. Knevals*, 106 U. S. 370; *Rich v. Braxton*, 158 U. S. 407.

by such sale.<sup>60</sup> But if the title to be created by a sale is such that its invalidity can be determined from inspection, or that the true owner need offer no evidence to protect himself from it, then it is not a cloud on his title, and the sale will not be enjoined.<sup>61</sup> A sale of the property of a wife, under an execution against her husband, is usually regarded as creating a cloud upon her title. Hence it will be enjoined.<sup>62</sup>

§ 439. The Sale of Homestead Property under execution has frequently been enjoined. The injunction in such cases has uniformly been justified, upon the ground that the sale, if permitted to be made, would create a cloud on the defendant's title.<sup>63</sup> In Iowa, where it is evident that all the land claimed as a homestead cannot be held as exempt, it is insisted that the

<sup>60</sup> *Pixley v. Huggins*, 15 Cal. 127; *Englund v. Lewis*, 25 Cal. 337; *Bach v. Goodrich*, 9 Rob. (La.) 391; *Downing v. Mann*, 43 Ala. 266; *Martin v. Hewett*, 44 Ala. 418; *Key City G. L. Co. v. Munsell*, 19 Iowa, 305; *Shattuck v. Carson*, 2 Cal. 588; *Pettit v. Shepherd*, 5 Paige, 493, 28 Am. Dec. 437; *Norton v. Beaver*, 5 Ohio, 178; *Bank of United States v. Schultz*, 2 Ohio, 471; *McCulloch v. Hollingsworth*, 27 Ind. 115; *Porter v. Pico*, 55 Cal. 165; *Sharpe v. Tatnall*, 5 Del. Ch. 302.

<sup>61</sup> *Meloy v. Dougherty*, 16 Wis. 269; *Moore v. Cord*, 14 Wis. 213; *Davidson v. Seegar*, 15 Fla. 671; *Scott v. Onderdonk*, 14 N. Y. 9, 67 Am. Dec. 106; *Pixley v. Huggins*, 15 Cal. 127; *Gamble v. St. Louis*, 12 Mo. 617; *Hughes v. Melville*, 60 Ill. App. 419; *Reyes v. Middleton*, 36 Fla. 99, 51 Am. St. Rep. 17.

<sup>62</sup> *Alverson v. Jones*, 10 Cal. 9, 70 Am. Dec. 689; *Culver v. Rogers*, 28 Cal. 520; *Nixon v. Nash*, 12 Ohio St. 651, 80 Am. Dec. 390. See, also, § 437.

<sup>63</sup> *Volger v. Montgomery*, 54 Mo. 577; 13 Am. Law Reg. 244; *Dunn v. Tozer*, 10 Cal. 167; *Tucker v. Kenniston*, 47 N. H. 267, 93 Am. Dec. 425; *Conklin v. Foster*, 57 Ill. 104; *Marriner v. Smith*, 27 Cal. 649; *Culver v. Rogers*, 28 Cal. 520; *Roth v. Insley*, 86 Cal. 140; *Ketchin v. McCarley*, 26 S. C. 1, 4 Am. St. Rep. 674; *Webb v. Hayner*, 49 Fed. Rep. 601. The cases cited above arose where homesteads had been created under the state exemption laws. In *Miller v. Little*, 47 Cal. 348, the same rule was applied to lands acquired under United States homestead laws.

claimant has a complete remedy at law by taking the proceeding therein provided for the segregation of his homestead, and that in the absence of any resort to such proceeding, or any showing that it would not prove adequate, he is not entitled to an injunction.<sup>64</sup> In Texas, the sale of personal property was enjoined because it was by law exempt from execution.<sup>65</sup> No reason for the decision was given, and we doubt whether any sufficient reason can be found. The tendency to protect the exemption right in personal property by the issuing of injunctions is, nevertheless, increasing.<sup>66</sup> The remedy at law, where exempt personal property is seized, is in most, and perhaps in all, cases adequate for the protection of the interests of the claimant. Where such is the case, an injunction should be denied.<sup>67</sup> We admit, however, that in many instances, the remedy at law may be inadequate, and that by showing it to be so, the claimant may entitle himself to relief in equity.

**§ 440. Compelling Particular Property to be First Sold.** Equity will interpose to prevent a judgment creditor from proceeding in such a manner as will needlessly destroy or imperil the interests of alienees or encumbrancers of the judgment debtor. Thus if an execution is a lien upon two or more parcels of property, and some person other than the judgment creditor has a junior lien on one of those parcels only, it is manifest

<sup>64</sup> *Henderson v. Rainbow*, 76 Ia. 320.

<sup>65</sup> *Nichols v. Claiborne*, 39 Tex. 363; *Stein v. Freilberg*, 64 Tex. 271.

<sup>66</sup> *McMichael v. Eckman*, 26 Fla. 43; *Smith v. Lufford*, 36 Fla. 481, 51 Am. St. Rep. 37; *Cunningham v. Conway*, 25 Neb. 615.

<sup>67</sup> *Drigg's Bank v. Norwood*, 49 Ark. 135, 4 Am. St. Rep. 30; *Bailey v. Wade*, 24 Mo. App. 186; *Parsons v. Hartman*, 25 Or. 547, 42 Am. St. Rep. 803.

that if the latter were allowed to first sell that property which is subject to the lien of the former, such lien would be utterly destroyed. This destruction might be wanton in its nature, because made while the debtor had abundance of property to satisfy the execution without resorting to that which is subject to the junior lien. In such a case, equity will require the execution creditor to first sell the property which is not liable to the junior lien, and will restrain him from selling the property which is subject to such lien until after he shall have first exhausted the other property subject to his writ.<sup>68</sup> "We fully recognize the force of the equitable doctrine applied to creditors having liens on different funds, namely, that a person having two funds to satisfy his demands shall not, by his election, disappoint a party who has only one fund, or, as stated by Chancellor Kent with his accustomed clearness, in *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 7 Am. Dec. 494: 'If a creditor has a lien on two different parcels of land, and another creditor has a lien of a younger date on one of those parcels only, and the prior creditor elects to take his whole demand out of the land on which the junior creditor has a lien, the latter will

<sup>68</sup> *Henshaw v. Wells*, 9 Humph. 568; *York & J. S. B. F. Co. v. Jersey Co.*, Hopk. 460; *Ramsey's Appeal*, 2 Watts, 228, 27 Am. Dec. 301; *Hannegan v. Hannah*, 7 Blackf. 353; *Bruner's Appeal*, 7 Watts & S. 269; *Applegate v. Mason*, 13 Ind. 75; *Ingalls v. Morgan*, 10 N. Y. 178; *Findlay v. Bank of United States*, 2 McLean, 44; *Cheesebrough v. Millard*, 1 Johns. Ch. 409, 7 Am. Dec. 494; *Alston v. Munford*, 1 Brock. 266; *Evertsen v. Booth*, 19 Johns. 486; *Besley v. Lawrence*, 11 Paige, 581; *Mechanic's Bank v. Edwards*, 1 Barb. 271; *Baine v. Williams*, 10 Smedes & M. 113; *Geller v. Hoyt*, 7 How. Pr. 265; *Trimmer v. Bayne*, 9 Ves. 209; *Lanoy v. Athol*, 2 Atk. 446; *Lee v. Gregory*, 12 Neb. 282; *Banks v. Speers*, 103 Ala. 436; *Francis v. Herren*, 101 N. C. 497; *Hall v. Stevenson*, 19 Or. 153, 20 Am. St. Rep. 803; *Hudkins v. Ward*, 30 W. Va. 204, 8 Am. St. Rep. 22; *Gotsian v. Shakman*, 89 Wis. 52, 46 Am. St. Rep. 820.

be entitled either to have the prior creditor thrown upon the other fund, or to have the prior lien assigned to him, and to receive all the aid it can afford him.' This principle, derived from the civil law, and incorporated into the English chancery law, is sometimes called the doctrine of substitution, and is most usually applied to the marshaling of assets in bankruptcy cases, and the like. The operation of the principle is not affected by the nature of the property which constitutes the double fund, but applies whenever a paramount creditor holds collateral security, or can resort collaterally to other real or personal estate for the satisfaction of the debt."<sup>69</sup> If the judgment debtor has sold any part of the property which is subject to the lien of the writ or judgment, equity will protect the alienee, if it can do so without injustice to the creditor. Hence it will enjoin the latter from selling the property purchased by the former, until after he has sold all other property liable to sale under the writ.<sup>70</sup> If the judgment debtor has aliened different parcels of land at different times, equity will compel the creditor to sell such parcels inversely to the order of their alienation.<sup>71</sup> But it must be remembered that equity

<sup>69</sup> *Ross v. Duggan*, 5 Col. 85.

<sup>70</sup> *Agricultural Bank v. Pallen*, 8 Smedes & M. 359, 47 Am. Dec. 92; *James v. Hubbard*, 1 Paige, 228; *Russell v. Houston*, 5 Ind. 180; *Welch v. Tittsworth*, 22 How. Pr. 474; *Clowes v. Dickenson*, 5 Johns. Ch. 235; 9 Cow. 403; *Rollins v. Thompson*, 13 Smedes & M. 522; *Hurd v. Eaton*, 28 Ill. 122; *Thompson v. Murray*, 2 Hill Ch. 204, 29 Am. Dec. 68; *Baine v. Williams*, 10 Smedes & M. 113; *Massie v. Wilson*, 16 Iowa, 390; *Sidener v. White*, 46 Ind. 588; *Houston v. Houston*, 67 Ind. 276; *Edwards v. Applegate*, 70 Ind. 325; *Commercial Bank v. Western R. Bank*, 11 Ohio, 444, 38 Am. Dec. 739; *McClung v. Beirne*, 10 Leigh, 394, 34 Am. Dec. 739; *Merchants' N. B. v. Stanton*, 55 Minn. 211, 43 Am. St. Rep. 491.

<sup>71</sup> *Hunt v. Ewing*, 12 Lea, 519; *Renick v. Ludington*, 20 W. Va. 511; *Crawford v. Richeson*, 101 Ill. 351; *James v. Hubbard*, 1 Paige, 228; *Gouverneur v. Lynch*, 2 Paige, 300; *Stephens v. Olay*, 17 Colo.



will not interpose to enjoin the execution creditor, where, by so doing, it will destroy or imperil his rights, or prevent him from obtaining that satisfaction of his judgment to which he is both legally and equitably entitled.<sup>72</sup>

The judgment creditor is entitled to sell the homestead of the defendant when his judgment is to foreclose some mortgage or other lien, or when it is based upon some claim against which the homestead exemption cannot prevail. It may be that his lien also includes other property. If there are any other persons interested in such other property, they will desire to have the homestead first sold, to free from the plaintiff's judgment the property against which their claims may be enforced, while the defendants, on the other hand, will seek to have the other property first sold, in order that the liability of the homestead to sale may either be terminated, or reduced to the lowest possible amount. Upon this subject the decisions are irreconcilable. Some of them sustain the right of purchasers or holders of liens upon the nonhomestead property to compel a plaintiff entitled to sell the homestead to resort to it before pursuing the other property.<sup>73</sup> But the more reasonable view is, that the equity of the homestead claimants to retain their home is at least equal to that of their creditors to have it sold, and

489, 31 Am. St. Rep. 328; *Boone v. Clark*, 129 Ill. 466; *Crosby v. Farmers' Bank*, 107 Mo. 436; *Libby v. Tufts*, 121 N. Y. 172; *Turner v. Flenniken*, 164 Pa. St. 469, 44 Am. St. Rep. 624.

<sup>72</sup> *James v. Hubbard*, 1 Paige, 228; *Hudkins v. Ward*, 30 W. Va. 204, 8 Am. St. Rep. 22.

<sup>73</sup> *White v. Polleys*, 20 Wis. 503, 91 Am. Dec. 432; *Pittman's Appeal*, 48 Pa. St. 315; *Jones v. Dow*, 18 Wis. 241; *Shelly's Appeal*, 36 Pa. St. 373; *Myers' Appeal*, 78 Pa. St. 452. The effect of the Wisconsin decisions has been nullified by a statute of that state. *Sanborn & Berryman's Ann. Wis. Stats.*, § 3163.

therefore that chancery will not aid the latter by compelling the judgment creditor to first resort to the homestead.<sup>74</sup> Perhaps a more difficult question is, May one who has a lien on homestead and other property be compelled by the homestead claimants to first resort to the latter? On the one side, it is insisted that the right to compel a marshaling of assets never existed in favor of judgment debtors, but only in behalf of persons claiming under them, and that the creation of the lien by the homestead claimants was, in effect, an agreement on their part that the lienholder might at his discretion sell any of the property which was subject to such lien, and that such agreement precludes such claimants from exercising any control over such discretion.<sup>75</sup> But homestead laws should be liberally construed, and no intention should be presumed, nor should any interpretation be indulged which is at variance with the natural and obvious purpose of the parties. The claimants, in the absence of any expression of a contrary intent, should be presumed to intend no further peril to their homestead than necessity demands, while he who receives a mortgage from them should be regarded as obtaining a mere security for his debt, and not the right to employ that security in such a mode as to needlessly imperil the homestead. Hence a mortgage on a homestead and other property may fairly be interpreted as a waiver of the homestead right only so far as may be necessary to secure the debt; or, in other words, as a stipulation that the

<sup>74</sup> *Brown v. Cozard*, 68 Ill. 180; *Ray v. Adams*, 45 Ala. 168; *McArthur v. Martin*, 23 Minn. 80; *Foley v. Cooper*, 43 Iowa, 376; *Colby v. Crocker*, 17 Kan. 527; *Hodges v. Hickey*, 67 Miss. 715; *Mitchelson v. Smith*, 28 Neb. 583, 26 Am. St. Rep. 357; *Shell v. Young*, 32 S. C. 462.

<sup>75</sup> *Searle v. Chapman*, 121 Mass. 19; 4 Am. L. T. Rep. 386; *Plain v. Roth*, 107 Ill. 588.

homestead may be sold, if the other property proves inadequate to satisfy the mortgagee's demand. Under this interpretation, the homestead claimants are entitled to compel the sale of the other property in preference to the homestead, and need not submit to the sale of the homestead until the other securities have been exhausted, without fully discharging the debt.<sup>76</sup> If a mortgagor is, as between himself and his comortgagors, a mere surety, he may compel the lands of the latter to be first sold.<sup>77</sup>

There may, perhaps, be circumstances which estop a husband and wife from claiming that other lands included in the mortgage with their homestead be first sold, and may, on the contrary, entitle the grantee of such lands to have the homestead sold for the purpose of relieving them from liability. Thus, where a husband and wife executed a mortgage embracing their homestead and other lands, and subsequently conveyed the latter with covenants of warranty, it was held that, after their voluntary conveyance with such covenants, "they had no right to insist that their homestead shall be protected to the displacement of a countervailing equity to their grantee, that the portion of the mortgaged premises retained by them shall be the paramount fund for the payment of the mortgage."<sup>78</sup>

<sup>76</sup> *McLaughlin v. Hart*, 46 Cal. 639; *Bartholomew v. Hook*, 23 Cal. 277; *Butler v. Stalnback*, 87 N. C. 218; *Wilson v. Patton*, 87 N. C. 318; *Frick Co. v. Ketels*, 42 Kan. 527, 16 Am. St. Rep. 507; *Miller v. McCarty*, 47 Minn. 321, 28 Am. St. Rep. 375; *Koen v. Brill*, 75 Miss. 870, 65 Am. St. Rep. 633; *McCreery v. Shaffer*, 26 Neb. 179; *Mitchelson v. Smith*, 28 Neb. 583, 26 Am. St. Rep. 357; *Shell v. Young*, 32 S. C. 462.

<sup>77</sup> *Wilcox v. Todd*, 64 Mo. 388; *Johns v. Reardon*, 11 Md. 465; *Knight v. Whitehead*, 26 Miss. 245; *Loomer v. Wheelwright*, 3 Sand. Ch. 135; *Moffitt v. Roche*, 77 Ind. 48.

<sup>78</sup> *Merchants' N. B. v. Stanton*, 55 Minn. 211, 43 Am. St. Rep. 491.

**§ 441. Injunctions from Courts of Bankruptcy.**—The bankruptcy act of 1867 as subsequently incorporated in the Revised Statutes of the United States provided that when a petition for an adjudication of involuntary bankruptcy should be filed, the court might “by injunction restrain the debtor, and any other person, from making any transfer or disposition of any part of the debtor’s property” not excepted from the operation of the act.<sup>79</sup> The district and circuit courts of the United States deemed the power to issue injunctions enjoining persons from proceeding in state courts to be necessary to a complete adjustment of the relative rights of the bankrupt and his creditors; and these subordinate federal courts, finding this power exceedingly convenient and useful, in numerous instances, affirmed its existence, and proceeded to exercise it in a most summary manner. In fact, the history of the adjudications made under the late bankrupt act is but an exhibition of the most remarkable usurpation of powers on the part of the district and circuit courts. This usurpation has, at all proper opportunities, been checked and discountenanced by the supreme court.<sup>80</sup> Precisely when, if at all, a court having jurisdiction of proceedings in bankruptcy may enjoin a plaintiff from enforcing an execution issued out of a state court, cannot be known until the supreme court shall have determined the question. Executions have, in several instances, been enjoined when the levies thereunder were made after the institution of the proceedings in bank-

<sup>79</sup> Rev. Stats. U. S., § 5024.

<sup>80</sup> See *Smith v. Mason*, 14 Wall. 419; *Marshall v. Knox*, 16 Wall. 551; *Wilson v. City Bank*, 17 Wall. 476; *Mays v. Fritton*, 20 Wall. 414; *Doe v. Childress*, 21 Wall. 642; *Elyster v. Gaff*, 8 Chic. L. N. 177; 91 U. S. 521.

ruptcy.<sup>81</sup> But not satisfied with this, the lower courts did not hesitate to proceed to take such further steps as were necessary to give them that exclusive control over the bankrupt's assets which they deemed essential to the accomplishment of the objects at which they supposed the act to be directed. Creditors having liens which, prior to the commencement of the proceedings in bankruptcy, had been perfected by levies under executions, were, often in a summary manner, forced to relinquish the possession of the property held under their writs, to turn such property over to the debtor's assignee, and forego the realization of the benefit of their liens until it could be accomplished in the federal courts.<sup>82</sup> It is now to be settled, beyond controversy, that if, before the filing of the petition in bankruptcy, a levy has been made, and the property placed in custodia legis, the possession of the officer holding the writ cannot be disturbed by the court in which the petition is filed. The officer, by the levy, acquires a special property, together with the right to retain possession, and to dispose of the property as directed by his writ.<sup>83</sup>

<sup>81</sup> *Hyde v. Bancroft*, 8 Nat. Bank. Reg. 24; 6 Ben. 392; *Pennington v. Sale*, 1 Nat. Bank. Reg. 572; *Jones v. Leach*, 1 Nat. Bank. Reg. 595; *In re Wallace*, 2 Nat. Bank. Reg. 134; 1 Deady, 433.

<sup>82</sup> *In re Mallory*, 6 Nat. Bank. Reg. 22; 1 Saw. 88; 2 L. T. B. 247; *In re Atkinson*, 7 Nat. Bank. Reg. 143; 5 L. T. B. 320; 4 Chic. L. N. 359; 19 Pittsb. L. J. 188; *Irving v. Hughes*, 7 Am. Law Reg. 209; *Samson v. Burton*, 6 Nat. Bank. Reg. 403; 5 Ben. 343; *In re Ulrich*, 8 Nat. Bank. Reg. 15; 6 Ben. 483; *In re Bowle*, 1 Nat. Bank. Reg. 185; *Sedgwick v. Menck*, 1 Nat. Bank. Reg. 108; *Bump on Bankruptcy*, 8th ed., pp. 206, 207, 217.

<sup>83</sup> *Townsend v. Leonard*, 1 Cent. L. J. 69; *Johnson v. Bishop*, 1 Woolw. 324; *Appleton v. Bowles*, 6 Chic. L. N. 192; *Marshall v. Knox*, 16 Wall. 551; 8 Nat. Bank. Reg. 97; *Campbell's Case*, 1 Abb. 185; 1 Nat. Bank. Reg. 165; 1 L. T. B. 30; *In re William Burns*, 7 Am. Law Reg. 105; 1 Nat. Bank. Reg. 174; 24 Leg. Int. 357; *Clark v. Binniger*, 38 How. Pr. 341; 3 Nat. Bank. Reg. 518; 3 L. T. B. 49; *Tenth Nat. Bank v. Sanger*, 42 How. Pr. 179; *Ex parte Donald-*

§ 441 a. Proceedings under the National Bankruptcy Act of 1898.—The provisions in the national bankruptcy act of 1898 are, in many respects, more vague than those of its predecessor, but we apprehend that the decisions under the earlier statute will, in the main, be found applicable to the present act in so far as they relate to the subject here under consideration. Various classes of demands are excluded from the effect of a discharge, among which are judgments in actions for fraud or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another, and demands created by fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.<sup>84</sup> All judgments, attachments, and other liens obtained through legal proceedings against the bankrupt at any time within four months prior to the filing of the adjudication, are, upon his being adjudged a bankrupt, deemed null and void, and his property, freed therefrom, vests in his trustee, unless the court shall order the liens preserved thereon for the benefit of the estate.<sup>85</sup> It follows from this provision, 1, as to judgments of the class from which a discharge affords no protection, and also those creating liens upon the property of the bankrupt not released by his bankruptcy, that some further proceeding may be taken to compel their satisfaction, and 2, that as to writs issued upon judgments, the effect of which is

son. 7 Am. Law. Reg. 213; *Smith v. Mason*, 14 Wall. 419; 6 Nat. Bank. Reg. 1; *Wilson v. Childs*, 8 Nat. Bank. Reg. 527; 21 Pittsb. L. J. 17; 30 Leg. Int. 321; 6 Chic. L. N. 27; *Peck v. Jenness*, 7 How. 612; *Colby v. Ledden*, 7 How. 626; *In re Shuey*, 9 Nat. Bank. Reg. 526; 6 Chic. L. N. 248; *Goddard v. Weaver*, 6 Nat. Bank. Reg. 440; *Thompson v. Moses*, 43 Ga. 383.

<sup>84</sup> National Bankruptcy Act. § 17.

<sup>85</sup> *In re Richards*, 96 Fed. Rep. 935.

destroyed by the act, some remedy must exist on the part of the trustee of the bankrupt to recover possession of property which thereunder has been held by some officer of the state court.

Courts of bankruptcy are given authority to "make such orders, issue such process, and enter such judgments, in addition to those specially provided for, as may be necessary for the enforcement of the provisions of the act."<sup>86</sup> Standing alone, this authority would seem to include the right to exercise jurisdiction upon any and every question which might be presented to the court of bankruptcy, provided it involved the property of the bankrupt or the administration of his estate, and it has been held that where property had been in the possession of an assignee for the benefit of creditors, and his right to hold it had terminated through an adjudication in bankruptcy, the court had the power, by summary proceedings, to direct him to deliver possession of the property to a trustee of the bankrupt. "The jurisdiction of the bankruptcy court is supreme; it is exclusive, and the acts of the state court are null and void, because jurisdiction over the person and estate of the bankrupt is drawn to, and vested exclusively in, this court by the adjudication in bankruptcy."<sup>87</sup> In a similar case, it was held that the court of bankruptcy had jurisdiction to enjoin an assignee from proceeding farther, and to appoint a marshal to take charge of the property.<sup>88</sup> Perhaps these decisions are sustainable on the ground that an assignee, acting under authority of the state statute, does not claim adversely to the bankrupt, but may be regarded as an

<sup>86</sup> § 2, sub. 15.

<sup>87</sup> *In re Smith*, 92 Fed. Rep. 135.

<sup>88</sup> *Davis v. Bohle*, 92 Fed. Rep. 325; *In re Gutwillig*, 92 Fed. Rep. 337; *In re Sievers*, 91 Fed. Rep. 366.

agent of the latter and of his creditors, and subject, as such, to such further orders as the court in bankruptcy may make. At all events, where there is a claim of right adverse to the bankrupt, and founded upon transfers made, or proceedings taken, prior to the filing of the petition by or against him, the court of bankruptcy will not interpose in a summary manner as against a person in possession of property, for the purpose of determining his right thereto and of directing him to surrender it to the trustee of the bankrupt.<sup>89</sup>

If, notwithstanding an adjudication of bankruptcy, a proceeding is about to be taken in the state courts, by an officer thereof, or by any other person, which he, because of such adjudication, is not entitled to take, the court in bankruptcy has authority to issue an injunction forbidding him from proceeding.<sup>90</sup> Where the holder of a chattel mortgage, after an adjudication and before the appointment of a trustee, proceeded to foreclose it, he was, by the court of bankruptcy, ordered to restore to the trustee the possession of any property remaining unsold and to account for the value of the remainder.<sup>91</sup>

If a court of bankruptcy exercises a summary jurisdiction over parties in possession of property and claiming the right thereto, or proceeds against them by injunction, mandatory or ordinary, this is likely to give rise to conflicts between the state and national courts, and, if the power exists, it should be sparingly em-

<sup>89</sup> In re Rockwood, 91 Fed. Rep. 363; In re Kelley, 91 Fed. Rep. 504; In re Price, 92 Fed. Rep. 987; In re Buntrock C. Co., 92 Fed. Rep. 886; In re Franks, 95 Fed. Rep. 635; In re Brodbine, 93 Fed. Rep. 643; Southern L. & T. Co. v. Benbow, 96 Fed. Rep. 514.

<sup>90</sup> Blake v. Francis-Valentine Co., 89 Fed. Rep. 691; In re Kletchka, 92 Fed. Rep. 901; Southern L. & T. Co. v. Benbow, 96 Fed. Rep. 514.

<sup>91</sup> In re Brooks, 91 Fed. Rep. 508.



ployed. If the bankruptcy court has actual possession of property, it may enjoin any interference therewith in the state courts, or by officers acting under their authority or otherwise.<sup>92</sup> On the other hand, if the property is in the possession of a state court, the bankruptcy courts should not undertake to compel the surrender of such possession, but should ask its trustee to seek his remedy in the courts of the state, or at least, in some independent suit, unless it is shown to be inadequate.<sup>93</sup> Upon this subject, we commend the following remarks of Judge Hammond in *In re Ogles*, 93 Fed. Rep. 426: "I wish to repeat here what was said in *In re Kelly*, 91 Fed. Rep. 504, that it is a mistaken view to suppose that the bankruptcy statute has, by its own force, gathered into the jurisdiction of the bankruptcy court, as such, all property held adversely to the bankrupt by third parties, but as to which the creditors claim that it belongs to them by reason of fraudulent preferences, fraudulent conveyances, and the like. It was well settled, under the bankruptcy statute of 1867, that the jurisdiction conferred upon the federal courts for the benefit of the assignee in bankruptcy was concurrent with, and did not divest the state courts of, suits of which they already had full cognizance. (*Eyster v. Gaff*, 91 U. S. 521.) The federal court has exclusive jurisdiction of proceedings in bankruptcy, strictly so called, and of the property of the bankrupt; but where the property is adversely claimed as against the bankrupt and his assignee or trustee in bankruptcy, the jurisdiction of the state and federal courts is concurrent. (Rev. St., §§ 711-716; *Clafin v. Housemann*, 93 U. S. 130.) The assignee or trustee often may

<sup>92</sup> *Keegan v. King*, 96 Fed. Rep. 758.

<sup>93</sup> *Ex parte Chetwood*, 165 U. S. 443.

be forced, and ordinarily should go, into the state court, and become a party to suits there pending, for such relief as he requires to protect his interests. Pending the appointment of an assignee or trustee, and in cases of contested adjudication, it sometimes may be necessary to resort to the bankruptcy court to stay the proceedings in the state court until that contest is decided and a trustee appointed; but such injunctions depend upon the particular circumstances of each case, and, in my judgment, where it appears that the trustee, when appointed, will have an ample remedy to recover the property affected or its value, that comity which governs the federal and state courts in their relation to each other should operate to withhold any injunction except in cases of imperative necessity. Through like comity, no doubt, if not as a matter of strict right, upon proper application by the petitioning creditors in bankruptcy in a proper case, the state court would stay its own proceedings a reasonable time, until the bankruptcy petition could be heard, and a trustee appointed, who could come into that court to be made a party, and assert his rights in the premises, and it is only after a refusal to do this that the bankruptcy court ordinarily should interfere. But, even then, the refusal to stay the proceedings could be corrected by error or appeal as a federal right denied, and, to avoid unnecessary and unseemly conflict between courts of co-ordinate jurisdiction, but diverse authority, that would be the preferable remedy. The application for an injunction must be denied."

When, after an adjudication in insolvency, it appears that there are liens which have not been displaced by it, the next question presented is, may the lienholders proceed to enforce their claims in the state courts,

or may the court of bankruptcy regard the whole property of the bankrupt as within its jurisdiction to the extent of requiring the lienholders to seek their remedies before it. There is no doubt that, in the absence of any action taken by the bankruptcy court, proceedings may go on in the state courts, and the property be there sold in satisfaction of the liens.<sup>94</sup> The courts of bankruptcy, it is insisted, have power, if they wish to do so, to order the sale of any property of the bankrupt "free of the encumbrances thereon, and the proceeds will stand as a substitute for the lands themselves for the benefit of persons holding liens, to the extent of their interests therein, and as a surplus for the benefit of the general creditors."<sup>95</sup> If so, it may become necessary for its courts, upon determining to exercise this power, to restrain proceedings in the state courts, though founded upon judgment or execution liens remaining in force notwithstanding the bankruptcy of the judgment creditor. Otherwise it would be impossible to effectually exercise the authority to direct a sale free of all liens.

<sup>94</sup> In re Easley, 93 Fed. Rep. 419; In re De Lue, 91 Fed. Rep. 510; In re Pittelkow, 92 Fed. Rep. 901; In re Holloway, 98 Fed. Rep. 638.

<sup>95</sup> Southern L. & T. Co. v. Benbow, 96 Fed. Rep. 514; In re Kirtland, 10 Blatchf. 516.

## CHAPTER XXXII.

### OF THE SATISFACTION OF EXECUTIONS AND THE DISTRIBUTION AND COLLECTION OF THEIR PROCEEDS.

- § 442. To whom payment may be made.
- § 443. How payment may be made.
- § 444. In what cases writs may be kept alive after payment.
- § 445. Satisfaction by proceedings under execution.
- § 446. Remedies where an officer is in doubt concerning the distribution of proceeds.
- § 446 a. Interpleader to determine right to proceeds.
- § 447. General rules concerning the rights of claimants of proceeds.
- § 448. When officers become liable for not paying over proceeds.
- § 449. When officers become liable for interest.
- § 450. Defenses to actions to recover money collected under execution.

§ 442. To Whom Payment may be Made.—In another work,<sup>1</sup> we have treated of the satisfaction of judgments. As writs of execution exist only for the purpose of enforcing judgments, it is evident that whenever a judgment is, by any means, satisfied, the writ which issued for its enforcement must also be treated as satisfied. Hence whatever we have written regarding the satisfaction of judgments, is applicable to the satisfaction of executions, and we shall, therefore, in this chapter, do little beyond repeating, in a condensed form, the substance of what we have heretofore written concerning the satisfaction of judgments. Satisfaction is produced—1. By payment made by or in behalf of the defendant in execution; and 2. By payment, or something which the law regards as equiva-

<sup>1</sup> Freeman on Judgments, c. 20.

lent to payment, produced by proceedings taken by a sheriff or constable under and by virtue of a writ of execution. The first question in regard to payment made by or for the defendant is this: To whom may the payment be made? The answer is, that it may be to the plaintiff,<sup>2</sup> or to one of several plaintiffs,<sup>3</sup> or to the officer holding the writ,<sup>4</sup> or to the plaintiff's attorney,<sup>5</sup> except where the defendant knows that the attorney has no authority to receive it, or to a *prochein ami*,<sup>6</sup> or the attorney of such *prochein ami*.<sup>7</sup> But an officer is not entitled to receive payment before the execution issues,<sup>8</sup> nor after the return day thereof,<sup>9</sup> be-

<sup>2</sup> *Atkinson v. Cooper*, 2 Humph. 361; *Lazarus v. Follmer*, 4 Watts & S. 9.

<sup>3</sup> *Erwin v. Rutherford*, 1 Yerg. 169. One of several co-obligees may receive payment, and grant a release from the obligation due to himself and others. *Freeman on Cotenancy and Partition*, §§ 177-180; *Wallace v. Kelsall*, 7 Mees. & W. 264; 8 Dowl. P. C. 841; 4 Jur. 1064; *Husband v. Davis*, 10 Com. B. 645; 20 L. J. Com. P. 118; *Jones v. Yates*, 9 Barn. & C. 532; 4 M. & R. 613; *Fitch v. Forman*, 14 Johns. 174; *Pierson v. Hooker*, 3 Johns. 68, 3 Am. Dec. 467; *Bulkley v. Dayton*, 14 Johns. 387; *People v. Keyser*, 28 N. Y. 228. 84 Am. Dec. 338; *Bowes v. Seeger*, 8 Watts & S. 222; *Ruddock's Case*, 6 Co. 25 a; *Razing v. Ruddock*, Cro. Eliz. 648.

<sup>4</sup> *Webb v. Bumpass*, 9 Port. 201, 33 Am. Dec. 310.

<sup>5</sup> *Harper v. Harvey*, 4 W. Va. 539; *Yoakum v. Tilden*, 3 W. Va. 167, 100 Am. Dec. 738; *Wilkinson v. Holloway*, 7 Leigh, 277; *Haden v. Walker*, 5 Ala. 86. Note to *Clark v. Randall*, 76 Am. Dec. 259; *Ely v. Harvey*, 6 Bush, 620; *Frazier v. Park's Adm'r*, 56 Ala. 363; *Rogers v. McKenzie*, 81 N. C. 164; *Miller v. Scott*, 21 Ark. 396; *Shaffer v. McCracken*, 90 Ia. 578, 48 Am. St. Rep. 465.

<sup>6</sup> *Morgan v. Thorne*, 7 Mees. & W. 400; *White v. Hall*, Sir F. Moore, 852; *Collins v. Brook*, 5 Hurl. & N. 700; 29 L. J. Ex. 255; 6 Jur., N. S., 999.

<sup>7</sup> *Baltimore & O. R. R. v. Fitzpatrick*, 36 Md. 624.

<sup>8</sup> *Bobo v. Thompson*, 3 Stew. & P. 385. See *Governor v. Read*, 38 Ala. 254.

<sup>9</sup> Ante, § 106; *Wood v. Robinson*, 3 Smedes & M. 271; *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *Edwards v. Ingraham*, 31 Miss. 272; *Barton v. Lockhart*, 2 Stew. & P. 109; *Hamilton v. Ward*, 4 Tex. 356; *Harris v. Ellis*, 30 Tex. 4, 94 Am. Dec. 296; *Williams v. Williamson*, 6 Ired. 281, 45 Am. Dec. 494. Contra, *James v. Yates*, 3 Met. (Ky.) 343.

cause prior to the issuing of the writ the exercise of his official functions has not been invoked, and after its return day his power to act, except for the purpose of disposing of property already levied upon, has terminated. If a payment is made to him, it can be received only in his private capacity. He is no longer the agent of the plaintiff nor of the law; and a payment to him, unless ratified or accepted by the plaintiff, is manifestly inoperative. To this rule we apprehend there must be an exception, when he has levied upon property before the return day which he is about to sell afterward. The defendant surely has the right to prevent this sale, and to entitle himself to the return of the property by paying the judgment. As the officer with respect to such property retains authority to compel payment, he must necessarily have power to accept it. Payment must be made to the real party in interest instead of to the nominal plaintiff, provided the interest of the former is known to the defendant.<sup>10</sup> The right of plaintiff to receive payment terminates when he assigns the judgment.<sup>11</sup> Payment to an officer not authorized to receive it is entirely inoperative, and can produce no satisfaction of the writ.<sup>12</sup> On the other hand, payment made to an officer authorized to receive it is of itself a satisfaction of the writ, although the money is wasted or misappropriated by the officer.<sup>13</sup>

<sup>10</sup> Triplett v. Scott, 12 Ill. 137; Zantzinger v. Old, 2 Dall. 265; Hodson v. McConnel, 12 Ill. 170.

<sup>11</sup> Guthrie v. Bashline, 25 Pa. St. 80.

<sup>12</sup> Bank of Georgetown v. Ault, 31 Ga. 359; Brier v. Woodbury, 1 Pick. 362.

<sup>13</sup> Planters' Bank v. Spencer, 3 Smedes & M. 305; Banks v. Evans, 10 Smedes & M. 35, 48 Am. Dec. 734; O'Neill v. Lusk, 1 Bailey, 220. But where the proceeding was in the nature of a creditor's bill, and the property was by order of the court sold by the sheriff, who embezzled the money, it was held that the sheriff was not the agent of

**§ 443. How Payment may be Made.**—A plaintiff may accept payment of his judgment in property of any kind or nature; having once accepted a note, check, bank bill, or any other thing of value, as a full satisfaction, he cannot subsequently revoke his own act and insist on payment in money.<sup>14</sup> An officer acting by virtue of an authority conferred by law,<sup>15</sup> or an attorney<sup>16</sup> acting under and by virtue of a general retainer, has no power to satisfy a judgment or execution, except upon payment to him in money of the entire amount due thereon. It has sometimes happened that the business of a particular locality was carried on almost exclusively in bank bills. Where this was the case, it was decided, in a few instances, that sheriffs

a mortgagee, on whose mortgage the money should have been paid, and therefore that the mortgage remained unsatisfied. *Chalmers v. Turnipseed*, 21 S. C. 126.

<sup>14</sup> *Witherby v. Mann*, 11 Johns. 519; *Lyon v. Northrup*, 17 Iowa, 314; *Weston v. Clark*, 37 Mo. 572; *Ives v. Phelps*, 16 Minn. 451; *Pasewalk v. Bollman*, 29 Neb. 519, 26 Am. St. Rep. 399; *Dunham v. Peterson*, 5 N. D. 414, 57 Am. St. Rep. 556.

<sup>15</sup> *Mitchell v. Hackett*, 14 Cal. 661; *Crutchfield v. Robins*, 5 Humph. 15, 42 Am. Dec. 417; *Dibble v. Briggs*, 28 Ill. 48; *Heald v. Bennett*, 1 Doug. (Mich.) 513; *Mumford v. Armstrong*, 4 Cow. 553; *Harris v. Ellis*, 30 Tex. 4, 94 Am. Dec. 296; *Williams v. Charles*, 7 Ala. 202; *Bobo v. Thompson*, 3 Stew. & P. 385; *Thorpe v. Wheeler*, 23 Ill. 544; *Planters' Bank v. Scott*, 5 How. (Miss.) 246; *Cooney v. Wade*, 4 Humph. 444, 40 Am. Dec. 657; *Haynes v. Bridge*, 1 Cold. 34.

<sup>16</sup> *Kenny v. Hazeltine*, 6 Humph. 63; *Keller v. Scott*, 2 Smedes & M. 81; *Perkins v. Grant*, 2 La. Ann. 328; *Phelps v. Preston*, 9 La. Ann. 488; *Greenwell v. Roberts*, 7 Law. 63; *Dunbar v. Morris*, 3 Rob. (La.) 278; *Smock v. Dade*, 5 Rand. 639, 16 Am. Dec. 780; *Garthwaite v. Wentz*, 19 La. Ann. 196; *Lewis v. Woodruff*, 15 How. Pr. 539; *Benedict v. Smith*, 10 Paige, 126; *Beers v. Hendrickson*, 45 N. Y. 665; *Jackson v. Bartlett*, 8 Johns. 361; *Wakeman v. Jones*, 1 Cart. 517; *Wilkinson v. Holloway*, 7 Leigh, 277; *Jones v. Ransom*, 3 Ind. 327; *Abbe v. Rood*, 6 McLean, 107; *Jewett v. Wadleigh*, 32 Me. 110; *Vail v. Conant*, 15 Vt. 314; *Lewis v. Gamage*, 1 Pick. 347; *McCarver v. Nealey*, 1 G. Greene, 360; *Smith v. Jones*, 47 Neb. 108, 53 Am. St. Rep. 519; *Granger v. Batchelder*, 54 Vt. 248, 41 Am. Rep. 846; *Watt v. Brookover*, 85 W. Va. 323, 29 Am. St. Rep. 811.

and other officers authorized to receive money under execution were justified in accepting such bills, and that by such acceptance a satisfaction of the writ was produced.<sup>17</sup> In none of these cases was the right of the plaintiff to exact payment in lawful money denied; but it was insisted that if bills of the class received by the officer were at the time of their reception generally circulating as money at the place where the writ issued, then that, in the absence of instructions to the contrary, there existed an implied assent that the officer might receive payment in such bills. Unquestionably, the temptation toward this line of decisions was at different periods very great in many of the states. The temptation was, however, very generally overcome.

A very decisive preponderance of the authorities declares that a payment in bank notes, when made to an attorney or an officer, produces no satisfaction unless the plaintiff elects to receive them. The reasoning on which they are based was quite satisfactorily stated by Judge Sharkey of Mississippi in an opinion, in the course of which he said: "By the execution the sheriff was commanded to levy the money. His duty was plain and his power limited. The command being to levy the money, the sheriff had no authority to depart from it, and being commanded to raise the money, he could not legally receive from the defendant by volun-

<sup>17</sup> *Laird v. Folwell*, 10 Heisk. 92; *Crutchfield v. Robins*, 5 Humph. 15, 42 Am. Dec. 417; *Haynes v. Wheat*, 9 Ala. 239; overruled in *Alcard v. Robbins*, 41 Ala. 541, 94 Am. Dec. 614. In North Carolina it was conceded that the plaintiff had the right to insist upon payment in coin (*Greenlee v. Sudderth*, 65 N. C. 470), but that he waived such right, and could be compelled to accept current bills, unless he gave notice to the officer, before the latter had made any collection, that nothing but lawful money would be received. *Governor v. Carter*, 3 Hawks, 328, 14 Am. Dec. 588; *Atkin v. Mooney*, 62 N. C. 31; *Utley v. Young*, 68 N. C. 387.



tary payment anything but money. By receiving anything else, the officer departs from his authority and from his duty, and his act, therefore, is not binding on the plaintiff. Before the judgment, the plaintiff was not bound to receive anything in discharge of his debt but gold and silver. Would it not be singular that after judgment, after the obligation had been raised in dignity, the defendant should be allowed to discharge it by depreciated paper money? That this payment was received by the sheriff makes no difference; in receiving it, he went beyond the scope of his power, and the plaintiff is not bound by his acts.”<sup>18</sup>

The plaintiff may ratify the act of an officer or attorney in receiving payment in bank bills, or in any other kind of property. That ratification may be presumed from his manifest acquiescence, as well as from his express declarations.<sup>19</sup> If a sheriff returns a writ satis-

<sup>18</sup> *Gasquet v. Warren*, 2 Smedes & M. 514; *Tutt v. Fulgham*, 5 How. (Miss.) 621; *Anderson v. Carlisle*, 7 How. (Miss.) 408; *Bright v. Ross*, 11 Smedes & M. 289; *Anketell v. Torrey*, 7 Smedes & M. 467; *Morton v. Walker*, 7 How. (Miss.) 554; *Prewett v. Standifer*, 8 Smedes & M. 493; *Griffin v. Thompson*, 2 How. 244; *McFarland v. Gwin*, 3 How. 717; *Gwin v. Breedlove*, 2 How. 29; *Alcardi v. Robbins*, 41 Ala. 541, 94 Am. Dec. 614; *Ralley v. Bagley*, 19 La. Ann. 172; *Wickliffe v. Davis*, 2 J. J. Marsh. 69; *Coxe v. State Bank*, 3 Halst. 172, 14 Am. Dec. 417; *Moody v. Mahurin*, 4 N. H. 296; *Sinclair v. Piercy*, 5 J. J. Marsh. 64; *Dunbar v. Morris*, 3 Rob. (La.) 278; *Chapman v. Cowles*, 41 Ala. 103, 91 Am. Dec. 508; *Holt v. Robinson*, 21 Ala. 100, 56 Am. Dec. 240; *Randolph v. Ringgold*, 10 Ark. 279, 52 Am. Dec. 235. Payment in confederate treasury notes, made during the late war, where they were the currency in common use, has, in Georgia and Louisiana, been held to have produced a satisfaction of the judgment. *Boyd v. Sales*, 39 Ga. 72; *Harvey v. Wolden*, 23 La. Ann. 162. The rule is otherwise in Alabama. *Alcardi v. Robbins*, 41 Ala. 541, 94 Am. Dec. 614; *Ellis v. Smith*, 42 Ala. 349; *Thompson v. Perryman*, 45 Ala. 620. Such a payment, if made to an officer after the confederacy had failed, is unquestionably inoperative. *Sirrine v. Griffin*, 40 Ga. 169.

<sup>19</sup> *Prewett v. Standifer*, 8 Smedes & M. 493; *McKay v. Smitherman*, 64 N. C. 47.

fied, when he has not received payment thereof in money, the plaintiff is not bound thereby. He may have the return vacated and procure an alias writ, or he may treat the return as true, and compel the sheriff to account to him for the amount of the writ in the kind of money which the officer was, by law, required to collect.<sup>20</sup> It is said that in other actions the officer's return is not conclusive, though between the parties to the action in which it was made, and hence, that if the plaintiff is met in another action by the plea that he has already recovered judgment and issued an execution thereon, and that it has been returned satisfied, he may overcome the effect of such return by proving that the satisfaction was based upon a sale of property under execution, and, after such sale, such property was claimed by a third person, who recovered judgment against the sheriff therefor, and that the plaintiff, having indemnified that officer, has been obliged to satisfy the judgment against him.<sup>21</sup>

Sometimes two or more judgments are based upon the same cause of action. This happens when one is entered for an original obligation, and the other upon a collateral obligation taken merely as security, and also when several judgments are entered against different persons who are severally, or jointly and severally, liable for a single tort or upon a single contract. In all these cases the satisfaction of one of the judgments operates as a satisfaction of all,<sup>22</sup> except as to costs.

<sup>20</sup> *Bank of Orange v. Wakeman*, 1 Cow. 43; *Colton v. Camp*, 1 Wend. 368.

<sup>21</sup> *Stewart v. Duncan*, 47 Minn. 285, 28 Am. St. Rep. 867.

<sup>22</sup> *Freeman on Judgments*, § 467; *Lockhart v. McElroy*, 4 Ala. 572; *McNutt v. Wilcox*, 1 Freem. Ch. 116; *Sherman v. Brett*, 7 Wis. 139; *Thompson v. Percival*, 5 Barn. & Adol. 925; *Craft v. Merrill*, 14 N.

**§ 444. In What Cases Writs may be Kept Alive after Payment.**—The voluntary payment of the amount due on a judgment or execution, if made unconditionally, and without any reservation of the right to keep the judgment alive, is unquestionably and irrevocably a satisfaction of the writ, no matter by whom the payment was made.<sup>23</sup> This rule has been very frequently enforced against sheriffs and constables who first paid off executions in their hands, and next attempted to indemnify themselves by proceeding as if such writs were still in force.<sup>24</sup> After a judgment has been satisfied, it is not within the power of the parties thereto to revive it or the right to issue execution thereon, and the agreement of the judgment debtor that, notwithstanding its payment, an execution may continue in force, is necessarily invalid, particularly when sought to be asserted against his creditors.<sup>25</sup>

Where an officer charged with the execution of a writ had so neglected his duty as to become liable to the plaintiff for the amount thereof, and thereafter

Y. 456; *Boardman v. Acer*, 13 Mich. 77, 87 Am. Dec. 736; note to *Kirkwood v. Miller*, 73 Am. Dec. 145; *Kenyon v. Woodruff*, 33 Mich. 315; *Blann v. Crocheron*, 19 Ala. 647, 54 Am. Dec. 203; *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711; *Melgs v. Bunting*, 141 Pa. St. 233, 23 Am. St. Rep. 273.

<sup>23</sup> *Stevens v. Morse*, 7 Greenl. 36, 20 Am. Dec. 337; *Caldwell v. Fifield*, 4 Zab. 150; *Sandford v. McLean*, 3 Palge Ch. 117; *Morris v. Lake*, 9 Smedes & M. 521, 48 Am. Dec. 724; *Rollins v. Thompson*, 13 Smedes & M. 522; *Banta v. Snapp*, 2 Duvall, 98; *Head v. Gervais*, Walk. 431, 12 Am. Dec. 577; *St. Francis M. Co. v. Sugg*, 83 Mo. 476; *Fort W. N. B. v. Daugherty*, 81 Tex. 301.

<sup>24</sup> *Harwell v. Worsham*, 2 Humph. 524, 37 Am. Dec. 572; *Whittier v. Heminway*, 22 Me. 238, 38 Am. Dec. 309; *Clevinger v. Miller*, 27 Gratt. 740; *Feamster v. Wlthrow*, 12 W. Va. 611; *Arnett v. Cloud*, 2 Ga. 53; *Houston v. Crutchfield*, 22 Ala. 76; *Reed v. Pruyn*, 7 Johns. 426, 5 Am. Dec. 287; *Boren v. McGehee*, 6 Port. 432, 31 Am. Dec. 695; *Sherman v. Boyce*, 15 Johns. 443; *Crutchfield v. Haynes*, 14 Ala. 49; *Beach v. Vandenburg*, 10 Johns. 361.

<sup>25</sup> *Satterfield v. Boyd*, 81 Ga. 316.

voluntarily discharged such liability, it was held that the writ was irrevocably satisfied.<sup>26</sup> But probably an officer, when compelled to pay the amount of an execution, is still entitled to enforce it in the name of the plaintiff, but for his own indemnity.<sup>27</sup>

From this rule, the courts of New York have expressed their dissent in a forcible and convincing manner; and have shown that a sound public policy requires that sheriffs and constables be not permitted to deal in writs of execution, except in their official capacity.<sup>28</sup> If two or more persons are liable upon a judgment, no doubt a payment by either will, unless its effect be limited by some reservation or agreement, operate as a satisfaction as to all.<sup>29</sup> The more difficult question is, whether any defendant, furnishing money sufficient to discharge a writ or judgment, may, by procuring an assignment or otherwise, keep it alive for the purpose of enforcing contribution from his codefendants. This question is answered in the negative in the states of Alabama,<sup>30</sup> Massachusetts,<sup>31</sup> New York,<sup>32</sup>

<sup>26</sup> *Lintz v. Thompson*, 1 Head, 456, 73 Am. Dec. 182; *Jones v. Wilson*, 3 Johns. 434; *Menderback v. Hopkins*, 8 Johns. 436. But in Massachusetts an officer may take an assignment of the judgment at the time he pays the amount to plaintiff, and may afterward enforce it against the defendant. *Dunn v. Snell*, 15 Mass. 481; see, also, *Neely v. Jones*, 16 W. Va. 642, 37 Am. Rep. 794; *Beard v. Arbuckle*, 19 W. Va. 142.

<sup>27</sup> *Smith v. Alexander*, 4 Sneed, 482; *Allen v. Holden*, 9 Mass. 133, 6 Am. Dec. 46.

<sup>28</sup> *Bigelow v. Provost*, 5 Hill, 566; *Carpenter v. Stillwell*, 11 N. Y. 61. These cases show that an officer paying a judgment cannot keep it alive by taking an assignment in his own name, or in the name of a third person.

<sup>29</sup> *Adams v. Drake*, 11 Cush. 504; *Stanley v. Nutter*, 16 N. H. 22; *Adams v. Keeler*, 30 Ga. 86.

<sup>30</sup> *Preslar v. Stallworth*, 37 Ala. 405.

<sup>31</sup> *Hammatt v. Wyman*, 9 Mass. 138.

<sup>32</sup> *Harbeck v. Vanderbilt*, 20 N. Y. 395.

and North Carolina;<sup>33</sup> and in the affirmative in the states of California,<sup>34</sup> Maryland,<sup>35</sup> Missouri,<sup>36</sup> and New Jersey,<sup>37</sup> and also in England.<sup>38</sup> If payment is made by a surety,<sup>39</sup> or an indorser,<sup>40</sup> he is entitled to be subrogated to the rights of the plaintiff, unless he makes an absolute payment without any reservation of his rights. Whether a surety may, without proceeding in equity, compel either a cosurety or his principal to submit to the issuing of execution on the judgment paid by such surety and of its employment for his indemnity, is a question involved in much doubt. Where the rule prevails, that one of several defendants may furnish moneys sufficient to satisfy a writ and take an assignment for the purpose of enforcing contribution, of course, the fact that one of the several defendants was a surety cannot deprive him of the benefit of the rule.<sup>41</sup> In several of the states, as we have already shown, this is not permitted. In those states, a defendant paying, or furnishing money to satisfy, a judgment, cannot deprive his codefendants of the effect of such satisfaction by proving that he who made it was a surety, and stipulated for the right to use the execu-

<sup>33</sup> *Towe v. Felton*, 7 Jones, 216; *Hinton v. Odenheimer*, 4 Jones Eq. 406; *Sherwood v. Collier*, 3 Dev. 380, 24 Am. Dec. 264.

<sup>34</sup> *Coffee v. Tevis*, 17 Cal. 239.

<sup>35</sup> *Wheeler's Estate*, 1 Md. Ch. 80.

<sup>36</sup> *Campbell v. Pope*, 96 Mo. 468.

<sup>37</sup> *Brown v. White*, 5 Dutch. 514, 80 Am. Dec. 226; reversing *White v. Brown*, 5 Dutch. 307.

<sup>38</sup> *McIntyre v. Miller*, 13 Mees. & W. 728.

<sup>39</sup> See *Freeman on Judgments*, § 470; *Barringer v. Boyden*, 7 Jones, 187; *Dempsey v. Bush*, 18 Ohio St. 376; *Sandford v. McLean*, 3 Paige, 117; *Hayes v. Ward*, 7 Johns. Ch. 123, 8 Am. Dec. 554; *Cottrell's Appeal*, 23 Pa. St. 294; *McClung v. Belrne*, 10 Leigh, 394, 34 Am. Dec. 739; *Baily v. Brownfield*, 20 Pa. St. 41.

<sup>40</sup> *Freeman on Judgments*, § 471; *Eno v. Crooke*, 10 N. Y. 66; *Corey v. White*, 3 Barb. 12.

<sup>41</sup> *Peebles v. Gay*, 115 N. C. 38, 44 Am. St. Rep. 429.

tion for the purpose of coercing indemnity or contribution.<sup>42</sup> Especially is this true where a suretyship does not appear by the record, and must, therefore, be established by extrinsic evidence.<sup>43</sup> If one becomes a surety for the payment of a judgment which his principal is under obligation to pay, as where the release of an attachment is procured by giving an understanding to pay any judgment which the plaintiff in the judgment may recover against one of the defendants therein, and judgment is afterward recovered against such defendant and his indorser, the surety in such undertaking cannot furnish moneys sufficient to satisfy the judgment against his principal, and, by having it assigned to a third person, enable the latter to take out execution and enforce it against such indorser. This is because his payment entitles him to be subrogated only to the rights of his principal, and the principal, not having any right in any circumstance to enforce the judgment against his indorser, cannot transfer such right through the operation of the doctrine of subrogation or otherwise.<sup>44</sup>

The effect of the satisfaction of a judgment upon the power of the officer to further proceed has been already considered, and the conclusion reached that a majority of the authorities show that it is equivalent to an absolute destruction of such power, and that this rule prevails as well against innocent purchasers as against persons cognizant of the satisfaction.<sup>45</sup>

<sup>42</sup> *McDaniel v. Lee*, 37 Mo. 204; *Hull v. Sherwood*, 59 Mo. 172.

<sup>43</sup> *Patterson v. Clarke*, 101 Ga. 214; *Ft. Worth N. B. v. Daugherty*, 81 Tex. 301.

<sup>44</sup> *March v. Barnet*, 121 Cal. 419, 66 Am. St. Rep. 44.

<sup>45</sup> *New England M. S. Co. v. Robson*, 79 Ga. 757; *Boos v. Morgan*, 180 Ind. 305, 30 Am. St. Rep. 237; *Pope v. Benster*, 42 Neb. 304, 47 Am. St. Rep. 703; *Willis v. McNatt*, 75 Tex. 69; ante, § 19; *Reynolds*

§ 445. **Satisfaction by Proceedings under Execution.** Satisfaction, instead of being produced by direct payment in money, may be created by proceedings taken under the execution. Thus it is produced, sometimes permanently and sometimes temporarily, by a levy upon personal property,<sup>46</sup> and also by the delivery of lands under an *elegit*.<sup>47</sup> The levy upon personalty is, to the extent of the property levied upon, a *prima facie* or conditional satisfaction;<sup>48</sup> but the apparent satisfaction may always be rebutted by showing that the levy was through no fault of plaintiff not productive,<sup>49</sup> and, as between plaintiff and defendant, by proving that the levy was released or abandoned with the defendant's consent, express or implied.<sup>50</sup> So the apparent satisfaction resulting from a sale may not be real, as where the process or proceedings are void. In that event, the right to further execution continues, and may best be enforced by motion for an order directing that the apparent satisfaction be canceled, and that an alias writ issue,<sup>51</sup> or, after a writ has been returned, the officer, on discovering that the sale is void,

*v. Lincoln*, 71 Cal. 183; *Finley v. Gaut*, 8 Baxt. 148. Contra, *Boren v. McGehee*, 6 Port. 432, 31 Am. Dec. 695; *Nichols v. Dissler*, 2 Vroom, 461, 86 Am. Dec. 219.

<sup>46</sup> See, ante, § 269; *Freeman on Judgments*, § 475.

<sup>47</sup> Ante, § 282; *Freeman on Judgments*, § 474. In Indiana, a levy on real estate is treated as a satisfaction to the same extent as a like levy on personalty. *Lindley v. Kelley*, 42 Ind. 204.

<sup>48</sup> *Oliver v. State*, 64 Ga. 480; *McCabe v. Goodwine*, 65 Ind. 288; ante, § 269.

<sup>49</sup> *Fry v. Manlove*, 57 Tenn. 256, 25 Am. Rep. 775; *McElwee v. Jeffreys*, 7 S. C. 228.

<sup>50</sup> *Young v. Cleveland*, 33 Mo. 126, 82 Am. Dec. 155; *Chandler v. Higgins*, 109 Ill. 602; *Cravens v. Wilson*, 48 Tex. 324; *Wright v. Young*, 6 Or. 87; *Lustfield v. Ball*, 103 Mich. 17; *Weber v. Cummings*, 39 Mo. App. 518.

<sup>51</sup> *Smith v. Reed*, 52 Cal. 345; *Chandler v. Goodrich*, 58 N. H. 525; ante, §§ 53, 54; *Zeigler v. McCormick*, 13 Neb. 25.

or that the purchaser will not pay the amount of his bid, may return the writ unsatisfied,<sup>52</sup> or proceed to make a further sale thereunder.<sup>53</sup> If a writ issues containing no directions with respect to the collection of interest, when the statute provides for such directions, it may be satisfied by paying the principal and costs, exclusive of interest, and if so satisfied, no writ can subsequently issue on that judgment.<sup>54</sup> Taking the defendant in execution was, at common law, regarded as a satisfaction of the judgment, at least so far that no other writs could be issued or executed while he remained in custody, nor after he had been discharged by the act or consent of the plaintiff.<sup>55</sup> An execution and judgment, without the direct payment of money, are often satisfied by a bid made by plaintiff at an execution sale.<sup>56</sup> Nor can this satisfaction be rebutted by proving that the title of the defendant was defective, if the plaintiff purchased with knowledge of the defect.<sup>57</sup> Where an apparent satisfaction proves not to be real, there are many instances in which it may be vacated, and in some states, the plaintiff would

<sup>52</sup> *Touhey v. Touhey*, 151 Ind. 460, 68 Am. St. Rep. 233.

<sup>53</sup> *Samuelson v. Bridges*, 6 Tex. Civ. App. 425.

<sup>54</sup> *Todd v. Botchford*, 86 N. Y. 517.

<sup>55</sup> *Freeman on Judgments*, §§ 476, 477; *Douglass v. Wallace*, 11 Ohio, 42; *Tanner v. Hague*, 7 Term Rep. 420; *Vlgers v. Aldrich*, 4 Burr. 2483; *Blackburn v. Stupart*, 2 East, 243; *King v. Goodwin*, 16 Mass. 63; *Ex parte Knowell*, 13 Ves. 193; *Jacques v. Withy*, 1 Durn. & E. 557; *Bowrell v. Zigler*, 19 Ohio, 362; *Lambert v. Parnell*, 15 L. J. Q. B. 55; 10 Jur. 31; *Dodge v. Doane*, 3 Cush. 460; *Cattlin v. Kernott*, 3 Com. B., N. S., 796; *McCrillis v. Slisson*, 1 R. I. 143; *Clark v. Clement*, 6 Durn. & E. 525; *Thompson v. Bristow*, Barnes' Notes, 205; *Coburn v. Palmer*, 10 Cush. 273.

<sup>56</sup> *Covington & C. B. Co. v. Walker*, 2 Duvall, 150; *Weaver v. Toogood*, 1 Barb. 238; *Perry v. Williams*, Dud. (S. C.) 44; *Smith v. Godbold*, 4 Strob. Eq. 186.

<sup>57</sup> *Goodbar Co. v. Daniel*, 88 Ala. 583, 16 Am. St. Rep. 76; *Thomas v. Glazener*, 90 Ala. 537, 24 Am. St. Rep. 830; *Gonce v. McCoy*, 101 Tenn. 587.



probably be justified in proceeding without taking any formal steps to procure such vacation.<sup>58</sup> A sale under a satisfied writ is, as we have heretofore shown, generally regarded as void.<sup>59</sup>

In exceptional circumstances, an execution may be satisfied without money being paid thereunder, and, on the other hand, one execution may be wholly satisfied without completely satisfying another on the same judgment. Thus, moneys realized under a forthcoming bond executed by a claimant and his sureties must be credited on the original execution, to prevent or release a levy under which the bond was given.<sup>60</sup> In New York, a redemption by a senior judgment creditor of lands sold under a junior judgment operates as a payment of the senior judgment, provided they are of sufficient value to pay the amount of his bid and his own judgment.<sup>61</sup> Execution may issue to different counties in the same state on the same judgment, and levies be made thereunder. Each may be released by the payment of the judgment and the costs accruing under it, but this does not release the other as to the costs due to the officer acting under it, and he may, therefore, still proceed to the extent of collecting such costs.<sup>62</sup>

<sup>58</sup> See §§ 53, 54, 352, 361; *Richardson v. McDougall*, 19 Wend. 80; *Newland v. Baker*, 21 Wend. 264; *Bank of Orange v. Wakeman*, 1 Cow. 46; *Newman v. Hazelrigg*, 1 Bush, 412; *Cowles v. Bacon*, 21 Conn. 451, 56 Am. Dec. 371; *Mumford v. Armstrong*, 4 Cow. 553; *Moore v. Edwards*, 1 Ball. 23; *Tarkinton v. Guyther*, 18 Ired. 100; *Townsend v. Smith*, 20 Tex. 465, 70 Am. Dec. 400; *McCornish v. Melton*, 5 Tyrw. 147; 1 Crompt. M. & R. 525; 3 Dowl. P. C. 215; *Kemp v. Gadderer*, 4 Dowl. P. C. 676.

<sup>59</sup> Ante, § 19; *Stilwell v. Carpenter*, 59 N. Y. 414.

<sup>60</sup> *Heard v. Duke*, 98 Ga. 134.

<sup>61</sup> *Benton v. Hatch*, 43 Hun, 142, 122 N. Y. 322.

<sup>62</sup> *Slater v. Alston*, 103 Ala. 605, 49 Am. St. Rep. 55.

**§ 446. Remedies where the Officer is in Doubt Concerning the Distribution of Proceeds of Sales.**—When moneys have been collected under execution, they should, of course, be paid over without delay to the person or persons entitled thereto. Where the officer is prompt and efficient, all proceedings to determine to whom the payment is to be made are likely to be instituted by him. Where he is not prompt, or where he has misappropriated the moneys, the proceedings are likely to assume the form of a suit against him and the sureties on his official bond. We shall first treat of proceedings where the officer is ready and willing to make payment, but is in doubt as to whom it should be made. If several writs are in an officer's hands against the same defendant, the latter may make a payment on either writ. If he chooses to pay one in preference to the other, his election is final. The money must be applied on the writ upon which the debtor paid it, whether such writ be the junior, senior, or intermediate. The officer has no other duty concerning such money than to pay it over under the writ to which the debtor assigned it.<sup>63</sup> Where money has been realized from the sale of property, and has thereby been actually or constructively brought into court, the rule is different. In such a case, the will of the debtor cannot prevail.<sup>64</sup> The money must be distributed in accordance with the rights of various persons having liens upon the property sold. A prudent officer will certainly seek to avoid the responsibility of determining these rights for himself. In contempla-

<sup>63</sup> *Rudy v. Commonwealth*, 35 Pa. St. 166, 78 Am. Dec. 330; *Miss. C. R. R. Co. v. Harkness*, 32 Miss. 203; *Adams v. Crimager*, 1 McMull. 309.

<sup>64</sup> *Thomas' Appeal*, 69 Pa. St. 120.

tion of law, the proceeds of a writ are brought into court by the officer, to be there, by the court, applied to the persons having paramount claims thereto. Hence, an officer may, in many of the states, make a return setting forth the claims of the various parties, and ask the court to make an order regulating the distribution of the funds in his hands.<sup>65</sup> This it will undertake to do after giving notice to all the parties interested and affording them an opportunity to present and support their respective claims.<sup>66</sup> The court issuing the senior writ is the one having authority to control the distribution of the proceeds.<sup>67</sup> But there is an evident, and no doubt a reasonable, antipathy against the practice of disposing of the proceeds of an execution in this summary method. Hence, some courts refuse to act in doubtful cases;<sup>68</sup> others decline to proceed unless all the proceeds are in fact paid into court;<sup>69</sup> and still others refuse to act in any case, leaving the officer to determine his own duty in the premises, and the parties in interest to redress them-

<sup>65</sup> *Williamson v. Johnston*, 7 Halst. 86; *Washington v. Sanders*, 2 Dev. 843, 21 Am. Dec. 836; *Palmer v. Clarke*, 2 Dev. 354, 21 Am. Dec. 840; *Dewey v. White*, 65 N. C. 225; *Bates v. Lilly*, 65 N. C. 232; *Wiley v. Bridgman*, 1 Head, 68; *McDonald v. Allen*, 87 Wis. 108, 19 Am. Rep. 754; *Chittenden v. Rogers*, 42 Ill. 95; *Stebbins v. Walker*, 2 Green. 90, 25 Am. Dec. 499; *Isler v. Colgrove*, 75 N. C. 334; *Cox v. Marlatt*, 7 Vroom, 390, 13 Am. Rep. 454; *Polk County v. Sypher*, 17 Iowa, 358, 85 Am. Dec. 568.

<sup>66</sup> *Williamson v. Wylie*, 69 Mo. App. 368; *Walker v. Braden*, 44 Kan. 707.

<sup>67</sup> *Heinselt v. Smith*, 34 N. J. L. 215; *Woodruff v. Chapin*, 3 Zab. 566, 57 Am. Dec. 416.

<sup>68</sup> *Williams v. Rogers*, 5 Johns. 163; *Fieldhouse v. Croft*, 4 East. 510; *Knight v. Criddle*, 9 East, 48; *Willows v. Ball*, 2 Bos. & P., N. R., 376; *Bruton v. Cannon*, Harp. 389; *Caskey v. McMullen*, 3 S. C. 196.

<sup>69</sup> *Wortman v. Conyngham*, 1 Pet. C. C. 241; *Masser v. Dewart*, 46 Pa. St. 534; *Troutman's Appeal*, 23 Pa. St. 491; *Williams' Appeal*, 9 Pa. St. 267.

selves by action against the officer in case he determines incorrectly.<sup>70</sup> For in all cases in which an officer undertakes to distribute funds in his hands, he assumes the risk of doing so correctly, and is answerable for the damages sustained by anyone through his mistaken acts.<sup>71</sup> In Pennsylvania the officer may pay the money into court; the various claimants may interplead concerning it; <sup>72</sup> issues of fact must, on demand of any claimant, be tried before a jury; <sup>73</sup> and the decision, when made, is final and conclusive.<sup>74</sup> In Alabama, if the claimants make an agreed case, the court may determine their respective claims without making the officer a party.<sup>75</sup> In South Carolina, if a person obtains a rule against an officer, to show cause why moneys should not be paid to him, the court must confine its decision to the claims of such claimant, and cannot award the moneys to a third person.<sup>76</sup> In Mississippi, on the other hand, the rights of all persons are considered; and an order injurious to one of the claimants may be reversed, though he did not join in prosecuting the appeal.<sup>77</sup>

**§ 446 a. Interpleader to Determine Right to Proceeds.** Where the officer has rightfully sold property, and different claims are interposed, or known by him to ex-

<sup>70</sup> *Trapnall v. Jordan*, 2 Eng. 430.

<sup>71</sup> *First M. E. Co. v. Fadden*, 8 N. D. 162; *Mark v. Osmer*, 138 Pa. St. 1.

<sup>72</sup> *Pennypacker's Appeal*, 57 Pa. St. 114.

<sup>73</sup> *Benson's Appeal*, 48 Pa. St. 159; *Reigart's Appeal*, 7 Watts & S. 267.

<sup>74</sup> *Noble v. Cope*, 50 Pa. St. 17. Generally, an order or judgment assuming to control the disposition of a fund does not bind parties not before the court. In the *Matter of Howard*, 9 Wall. 175.

<sup>75</sup> *Turner v. Lawrence*, 11 Ala. 427.

<sup>76</sup> *Caskey v. McMullen*, 3 S. C. 196.

<sup>77</sup> *Helzer v. Fisher*, 13 Smedes & M. 672.

ist, respecting the proceeds of the sale, or some part thereof, interpleader would seem, in many instances, to be his only adequate remedy, and therefore, one to which he has a right to resort. If it be true that moneys by him collected are to be deemed in the custody of the court, and therefore, payable only as it may direct, his right to seek such direction may, as to him, constitute an adequate remedy at law, and preclude him from seeking relief by interpleader.<sup>78</sup> Many of the courts, as we have shown, are disinclined to exercise summary jurisdiction for the purpose of determining, on motion, claims made to funds realized by a sheriff as the result of a sale lawfully made by him under execution. Certainly in those states, if not in others, he should be permitted to resort to the remedy of interpleader.<sup>79</sup>

**§ 447. General Rules Concerning the Rights of Claimants of Proceeds.**—Whether an officer seeks to distribute moneys in his hands with or without the aid of the court, an infinite variety of questions arise, and must be determined with reference to the respective rights and priorities of the various claimants. These questions may not, and usually do not, connect themselves with the law of executions, but are to be settled under various other branches of law defining general rights of property, and prescribing what liens may exist thereon, and how such liens may be created and continued. So far as these questions fall within the law of executions, their answers must be sought in

<sup>78</sup> *Parker v. Barker*, 42 N. H. 78, 77 Am. Dec. 789; *McDonald v. Allen*, 37 Wis. 108, 19 Am. Rep. 754.

<sup>79</sup> *Lawson v. Jordan*, 19 Ark. 297, 70 Am. Dec. 596; *Nash v. Smith*, 6 Conn. 421; *Kring v. Green's Ex.*, 10 Mo. 195; *Shaw v. Coster*, 8 Pal. 346, 25 Am. Dec. 690.

the chapter on execution liens.<sup>80</sup> It will there be seen that the proceeds of a sale made under a junior writ are frequently entirely consumed by senior writs in the officer's hands.<sup>81</sup> Hence it may happen that the writ under which a sale is made is not to any extent satisfied thereby. But, as a general rule, execution sales are subject to all liens paramount to that under which the sale is made. Hence the plaintiff under whose writ a sale is made is usually entitled to the proceeds of the sale, to the extent of satisfying his claim.<sup>82</sup> Senior lienholders are not entitled to participate in the proceeds, because their liens are unimpaired by the sale, and they may, as before, seek satisfaction out of the property sold. Where, however, the sale has the effect of transferring title free from all liens, then the senior lienholders must first be paid out of the proceeds.<sup>83</sup> Liens must be determined as they exist at the date of the sale.<sup>84</sup> If land is sold, the surplus proceeds of the sale must be dealt with and treated as land.<sup>85</sup> If the defendant made a conveyance after the inception of the lien, and before the sale,

<sup>80</sup> See c. 13.

<sup>81</sup> See § 196.

<sup>82</sup> *Hanauer v. Casey*, 26 Ark. 352; *Commercial Bank v. Coroner*, 6 How. (Miss.) 530, 38 Am. Dec. 447; *Bibb v. Jones*, 7 How. (Miss.) 397; *Commercial Bank v. Helderburn*, 6 How. (Miss.) 536; *Walker v. Anderson*, 31 Tex. 646; *Love v. Williams*, 4 Fla. 126; *Calmes v. Ford*, 6 Smedes & M. 190; *Whitely v. Riddick*, Chase Dec. 540; *Worsley v. Bryan*, 86 N. C. 343.

<sup>83</sup> See § 338. If a landlord has, by law, a lien on the chattels of his tenant, such lien must be first satisfied out of the proceeds of their sale. *Wickey v. Eyster*, 58 Pa. St. 501; *Weltner's Appeal*, 63 Pa. St. 302; *Rowland v. Goldsmith*, 2 Grant Cas. 378.

<sup>84</sup> *Douglass' Appeal*, 48 Pa. St. 223.

<sup>85</sup> *Matthews v. Duryee*, 45 Barb. 69; 4 Keyes, 525; *Jones v. Jones*, 1 Bland Ch. 443, 18 Am. Dec. 327; *Vartle v. Underwood*, 18 Barb. 561; *Mills v. Van Voorhies*, 20 N. Y. 412; *Walker v. Braden*, 44 Kan. 707.

then the surplus ought to be paid to his grantee if there are no liens paramount to his conveyance.<sup>86</sup> Creditors not having liens are not entitled to share in the distribution of the proceeds.<sup>87</sup> But all persons having liens which are subordinate to the sale are entitled to satisfaction out of the proceeds in the order of their priority.<sup>88</sup> As between equities otherwise equal, the elder should be given precedence.<sup>89</sup> The claim to share in the proceeds of a writ may be defeated by showing that the judgment upon which the claim is based was recovered and allowed for the purpose of defrauding the creditors of the judgment debtor.<sup>90</sup> In some of the states, preferences have been created by statute in favor of certain employes to the extent of allowing them, from the proceeds of the property of their employers, sold under execution, their salaries to a designated amount or for a specified period. Where these statutes prevail, and claims are made thereunder, they must, of course, be considered by the officer before distributing the proceeds of any sale made under execution.<sup>91</sup>

**§ 448. When the Officer Becomes Liable for not Paying over Proceeds.**—In several of the states, summary remedies have been provided by statute for the purpose of compelling sheriffs and constables to account

<sup>86</sup> *Every v. Edgerton*, 7 Wend. 259.

<sup>87</sup> *Smith v. Reiff*, 20 Pa. St. 364; *Helfrich's Appeal*, 15 Pa. St. 382; *Edwards v. Toomer*, 14 Smedes & M. 75.

<sup>88</sup> *Averill v. Loucks*, 6 Barb. 470; *Van Nest v. Yeomans*, 1 Wend. 87; *Steele v. Hanna*, 8 Blackf. 326; *Benton v. Shreeve*, 4 Ind. 66; *County of Polk v. Sypher*, 17 Iowa, 358. Hence the holder of a valid attachment lien is entitled to the benefit of it against a surplus arising from the sale of the land. *Straley's Appeal*, 43 Pa. St. 89.

<sup>89</sup> *Allen v. Sharp*, 65 Ga. 417.

<sup>90</sup> *Wandling v. Thompson*, 41 N. J. L. 309.

<sup>91</sup> *Johnston v. Varrills*, 27 Or. 251. 50 Am. St. Rep. 717; *Bixler v. Kresge*, 169 Pa. St. 405, 47 Am. St. Rep. 920.

for money collected by them under execution.<sup>91a</sup> These statutory remedies are cumulative. They leave the common-law remedies unimpaired.<sup>92</sup> Furthermore, they are penal in their character, and hence not applicable where the conduct of the officer is not characterized by willful wrong or gross negligence. Hence, if, acting on the advice of reputable attorneys, he pays moneys to one person when they should have been paid to another, or delays their payment because of well-founded doubts, and to enable those claiming the fund to litigate and have determined their respective interests therein, he cannot, in summary proceedings or otherwise, be subjected to any special penalty imposed upon him by law for not returning his writ or for not paying over the moneys collected by him thereunder.<sup>93</sup> At common law, the sheriff was expected, at the return day of the writ, either to pay into court the money required for its satisfaction, or to present a legal excuse for not having it to pay. The practice of paying money into court has been generally supplanted by the practice of paying it to the plaintiff. But the period at which the money ought to be paid over has not been changed. . An officer who has collected money under execution ought either to pay it into court or over to the plaintiff on or before the return day. If he does not do so, he is liable, in most states, to the

<sup>91a</sup> *Beaird v. Foreman*, 1 Scam. 40; *Dunn v. Vannerson*, 7 How. (Miss.) 579; *Buckmaster v. Drake*, 5 Gilm. 321.

<sup>92</sup> *De La Garza v. Booth*, 28 Tex. 479, 91 Am. Dec. 328. The statutory remedies usually enforce a penalty. They are therefore not allowed, except where the collection of the money is admitted. *Hinckly v. Bulham*, 5 Cal. 53; *Johnson v. Gorham*, 6 Cal. 195. They cannot be successfully invoked in doubtful cases. *Wilson v. Broder*, 10 Cal. 486; *Conway v. Campbell*, 11 Mo. 71; *Griffin v. Smith*, 2 Nev. 374.

<sup>93</sup> *Williams v. State*, 65 Ark. 159; *Custer v. Agnew*, 83 Ill. 194; *Hull v. Chapel*, 71 Minn. 408.



plaintiff in an action for money had and received, though no demand for payment has ever been made.<sup>94</sup> In England, though the correctness of this rule is undoubted, the courts will interpose in favor of an officer who has acted in good faith as against a plaintiff who is making an oppressive use of his legal remedies. The interposition is by granting a stay of proceedings.<sup>95</sup> In some of the states, no action can be brought against an officer for moneys collected under a writ, unless a demand has been made,<sup>96</sup> or he has assumed to hold the money in hostility to the plaintiff, or other person entitled thereto.<sup>97</sup> In Kentucky an officer is entitled to a demand when the defendant is a nonresident of the county.<sup>98</sup> The liability of officers before the return day has not been discussed with much frequency. The rule in force in Massachusetts is, that where money has been collected before the return day, the officer is at once liable to plaintiff if the latter demands payment;<sup>99</sup> but that, in the absence of such demand, no liability arises until after the return day.<sup>100</sup> Where the law requires a sale to be reported to the court and confirmed, it is the duty of the officer to retain the proceeds until an order of confirmation is made.<sup>101</sup> If a surplus has been real-

<sup>94</sup> *Brewster v. Van Ness*, 18 Johns. 133; *Dygert v. Crane*, 1 Wend. 534; *Nelms v. Williams*, 18 Ala. 650; *Nelson v. Kerr*, 59 N. Y. 224; *Lille v. Hoyt*, 5 Hill, 395, 40 Am. Dec. 360; *Dale v. Birch*, 3 Camp. 346; *Swain v. Morland*, 1 B. & B. 370; *Canterberry v. Commonwealth*, 1 Dana, 415; *Nelson v. Kerr*, 2 Thomp. & C. 299.

<sup>95</sup> *Jefferies v. Sheppard*, 3 Barn. & Ald. 696.

<sup>96</sup> *Church v. Clark*, 1 Root, 303; *Moody v. Mahurin*, 4 N. H. 296; *De La Garza v. Booth*, 28 Tex. 479, 91 Am. Dec. 328; *Wright v. Hamilton*, 2 Bail. 51, 21 Am. Dec. 513.

<sup>97</sup> *Sims v. Anderson*, 1 Hill (S. C.), 394.

<sup>98</sup> *Commonwealth v. Bartlett*, 7 J. J. Marsh. 161.

<sup>99</sup> *Rogers v. Sumner*, 16 Pick. 387.

<sup>100</sup> *Wilder v. Bailey*, 3 Mass. 289.

<sup>101</sup> *Stone v. Ruffin*, 2 Ohio, 503.

ized by a sale, the officer is responsible therefor to the defendant in execution, or to persons having liens and claims on the property sold.<sup>102</sup> If a writ, though in fact collected, has been returned nulla bona, the plaintiff's remedy is by an action for a false return.<sup>103</sup>

**§ 449. When Officer Becomes Chargeable with Interest.**—An officer retaining money in his hands, after the return day, without any legal excuse, is, in some states, chargeable with interest.<sup>104</sup> In other states, he is not so chargeable until after a demand for payment has been made.<sup>105</sup>

**§ 450. The Defenses to an Action to Recover Money Admitted to have been Collected** by an officer under execution are very limited in number. He may show that the money was realized from property belonging to a stranger to the writ,<sup>106</sup> or that the judgment or writ was utterly void. Irregularities in the writ or judgment, such as might have excused the officer from taking any action under the writ, do not justify him in refusing to pay over what he has collected. Money collected *colore officii* must be paid to the plaintiff, unless the writ was so clearly void as to afford no justification to the officer.<sup>107</sup> Hence the latter cannot resist an action to recover money collected under a writ, by showing that the plaintiff had been satisfied by proceedings

<sup>102</sup> *State v. Reed*, 5 Ired. 357.

<sup>103</sup> *Egery v. Buchanan*, 5 Cal. 53.

<sup>104</sup> *Slingerland v. Swart*, 13 Johns. 255; *Crane v. Dygert*, 4 Wend. 675.

<sup>105</sup> *Moore v. The Treasurers*, 1 Nott & McC. 214.

<sup>106</sup> *Newland v. Baker*, 21 Wend. 264.

<sup>107</sup> *Graydon v. Stone*, 1 Edm. Sel. Cas. 221; *Bacon v. Cropsey*, 7 N. Y. 195; *State v. Norris*, 19 Ark. 247; *People v. Dunning*, 1 Wend. 16; *Walden v. Davison*, 15 Wend. 575; *James v. Gurley*, 48 N. Y. 163.

under another writ, based upon another judgment, for the same liability.<sup>108</sup> The officer can make no defense inconsistent with his return. Therefore, where he has returned that a sale was made by him, or that the writ was satisfied by any other means, he cannot show that he did not receive the money for the sale,<sup>109</sup> or other satisfaction.<sup>110</sup> This rule prevails where the officer seeks to show that he received notes or other property which he was not authorized to take in satisfaction, as well as where he offers to prove that he received nothing whatever. An officer cannot excuse his nonpayment by showing that the plaintiff owed him a debt,<sup>111</sup> nor that the defendant<sup>112</sup> or the defendant's creditors<sup>113</sup> notified him not to pay, nor that the bank in which the money was deposited suspended payment.<sup>114</sup>

<sup>108</sup> *Hill v. Fitzpatrick*, 6 Ala. 314.

<sup>109</sup> *Ferguson v. Tutt*, 8 Kan. 370.

<sup>110</sup> *Payne v. Cowan*, 1 J. J. Marsh. 12; *Tiffany v. Johnson*, 27 Miss. 227; *Armstrong v. Garrow*, 6 Cow. 465; *Seltzinger v. Steinberger*, 12 Pa. St. 379; *Holt v. Robinson*, 21 Ala. 106, 56 Am. Dec. 240; *Field v. Smith*, 5 Dowl. P. C. 735; *Sutton v. Allison*, 2 Jones. 339; *Davis v. Hunt*, 2 Ball. 412; *Harper v. Fox*, 7 Watts & S. 142; *Boas v. Updegrave*, 5 Pa. St. 516, 47 Am. Dec. 425.

<sup>111</sup> *Fitch's Appeal*, 10 Pa. St. 461, 51 Am. Dec. 495; *Prewitt v. Marsh*, 1 Stew. & P. 17.

<sup>112</sup> *Walker v. Kennerly*, 3 Rich. 64; *Wallace v. Graham*, 13 Rich. 322.

<sup>113</sup> *Hooks v. Byrd*, 10 Rich. 120.

<sup>114</sup> *Phillips v. Lamar*, 27 Ga. 228, 73 Am. Dec. 731.

## CHAPTER XXXIII.

## EXECUTION AGAINST THE PERSON.

- § 451. History of—Cases in which it may issue.
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- § 453 a. Affidavit and moving papers.
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- § 467. Rearresting defendant.

§ 451. History of—Cases in Which It may Issue.—“At common law, where the king was plaintiff in any action, whether for debt or damages, he had execution against the defendant both for body, lands, and goods.”<sup>1</sup> But where a common person was a party plaintiff, he was not entitled to arrest the defendant except in actions of trespass vi et armis. “The common law, which is the preserver of the common peace

<sup>1</sup> 3 Salk. 286; Harbert's Case, 3 Co. 12 b.

of the land, did abhor all force as a capital enemy to it; and, therefore, against those who committed any force, the common law did subject their bodies to imprisonment, which is the highest execution, by which he loses his liberty till he agree with the party, and pay a fine to the king; and therefore it is a rule in law that, in all actions *quare vi et armis, capias lies*.”<sup>2</sup>

That imprisonment for debt was for a long time a disgrace upon our jurisprudence was owing, chiefly, to various statutory innovations upon the common law. That this disgrace has almost disappeared is also owing to statutory action. It may be well to remember that the exemption of debtors from arrest at common law was probably not the result of any concession of the inalienable right of the subject to personal liberty, but rather of a system of law, under which he was a mere vassal, owing services to some superior, and that the services due this superior would necessarily be interrupted by the imprisonment of the vassal. The statutes extending the right to arrest on civil process are therefore no evidence of any diminution of the privileges of the ordinary subject. They show only that the subject was becoming so independent of his superior that the person of the former could be dealt with without seriously impairing the conceded rights of the latter. Under the common-law system of procedure, much difficulty was experienced in compelling defendants to appear in response to writs issued against them. To partially remove this difficulty, a statute was enacted in the year 1267,<sup>3</sup> authorizing writs of *capias ad respondendum* to issue

<sup>2</sup> Harbert's Case. 3 Co. 12 a.

<sup>3</sup> Stat. 52 Henry III., c. 23, commonly known as the statute of Marlebridge.

against bailiffs, whereby the sheriff was empowered to arrest such bailiffs in actions against them for an accounting. In the year 1285, the same writs were authorized to issue against receivers to compel them to account.<sup>4</sup> In 1350, the same remedy was allowed to plaintiffs in actions of debt and detinue;<sup>5</sup> and in the year 1503, it was extended to actions on the case.<sup>6</sup>

The statutes to which we have referred were enacted with the view of securing the appearance of defendants. But the courts, without any statutory authority, always assumed that in every action in which a *capias ad respondendum* could issue, the plaintiff was, after judgment, entitled to execution against the body of the defendant.<sup>7</sup> The writ which issued after judgment to authorize the taking and detention of the defendant was styled a *capias ad satisfaciendum*. It is well known that the cases in which an execution may issue against the body of a defendant have been very materially diminished by statutes enacted during the present century, both in this country and in England. Such executions may, nevertheless, issue in many cases. The statutes on the subject are by no means uniform. Most of them authorize an execution against the body of the defendant whenever he has been found guilty of a fraud, or tort, or of misconduct in office, or in a professional employment, or of the embezzlement or conversion of the plaintiff's property; and also where the defendant is about to abscond, or where he has disposed or is about to dispose of his property for the purpose of defrauding his creditors; and also where

<sup>4</sup> Stat. 13 Edw. I., c. 11, commonly known as statute of Westminster 2.

<sup>5</sup> Stat. 13 Edw. III., c. 17.

<sup>6</sup> Stat. 19 Henry VII., c. 9.

<sup>7</sup> Tidd's Pr. 1025; 3 Salk. 286; 3 Coke, 12 a.

he has property which he conceals and refuses to apply to the satisfaction of a judgment against him.<sup>8</sup>

In one form or another prohibitions against imprisonment for debt are found in most, if not all, of our state constitutions. Usually these prohibitions allow exceptions in cases of fraud, willful injury to persons or property, or of fines or penalties imposed by law.<sup>9</sup> Courts, in construing such provisions, have frequently been called upon to determine to what extent they invalidated statutes authorizing civil executions against the body of a judgment debtor. Their manifest intent is to exempt from imprisonment the honest debtor who is poor, and in good faith unable to pay his debts. This shield of protection should not, therefore, be allowed to be interposed for the benefit of debtors who,

\* See Stats. 32 & 33 Vict., c. 62, otherwise known as the debtor's act of 1869. Sandel's & Hill's Dig. Ark. Stats., 1894, §§ 283, 298; Rice's Colo. Code Civ. Proc., § 246; Cal. Code Civ. Proc., § 479; Gen. Stats. Conn., 1888, §§ 1179-1181; Laws of Del., 1893, p. 749, § 15; Code of Georgia, 1895, § 4606; Rev. Stats. Idaho, 1887, § 4473; Starr & Curtis' Ann. Ill. Stats., 2d ed., p. 2334, § 5; Ann. Ind. Stats., 1894, §§ 803-805; Code of Iowa, 1897, § 4085; Gen. Stats., Kan., 1897, § 504; Kentucky Codes, 1895, § 168; Garland's Rev. Code of Practice, La., 1894, § 212; Me. Rev. Stats., 1883, c. 113; Mass. Pub. Stats., ed. 1882, c. 162; Howell's Ann. Stats. Mich., ed. 1882, § 7665; Stats. Minn., 1894, § 5487; Rev. Stats. Mo., 1889, § 4971; Mont. Code Civ. Proc., 1895, § 1261; Comp. Stats. Neb., 1897, §§ 6142-6146; Nev. Gen. Stats., 1885, §§ 3094, 3095, 3234; N. H. Gen. Laws, 1878, c. 225; Comp. Laws N. M., 1897, §§ 3107, 3131; Stovers' N. Y. Code Civ. Proc., 1895, §§ 549, 550, 1487-1489; Rev. Code of N. D., 1895, §§ 5504, 5505; Glaucque's Rev. Stats. Ohio, 7th ed., §§ 5448-5451; Hill's Ann. Laws of Or., 2d ed., §§ 275, 276, 279; Pepper & Lewis' Dig. Pa. Stats., pp. 1918, 1920, 2559; Gen. Laws, R. I., 1896, ch. 256, §§ 11, 16, 17; S. C. Gen. Stats., ed. 1882, §§ 308, 309; Rev. Stats. Utah, 1898, §§ 3233, 3273; Vt. Rev. Laws, 1881, c. 81, 82; Ballinger's Ann. Codes & Stats. Wash., §§ 5195, 5198; Code of W. Va., 3d ed., pp. 471, 472; Sanborn v. Berryman Ann. Stats. Wis., § 2973; Rev. Stats., Wyo., 1899, §§ 3915-3919.

\* See Meyer v. Berlandt, 39 Minn. 438, 12 Am. St. Rep. 663; United States v. Arnold, 69 Fed. Rep. 987; Kennedy v. People, 122 Ill. 649

being able to pay, yet seek to avoid doing so by assigning or concealing their effects, or by eluding judicial process. Consequently, courts have generally, and quite properly, upheld the validity of statutes authorizing the imprisonment of a debtor after the return of an execution unsatisfied and proof that he has property legally applicable to the discharge of his liabilities.<sup>10</sup> The imprisonment in such a case is not for debt, but for the neglect and refusal to perform a moral and legal duty, the performance resting in the ability of the debtor.<sup>11</sup>

The English statutes under which the debtors' prison became such a serious evil represent an extreme and totally illogical solution of a problem which, in later years, has been given more sensible consideration. Without losing sight of the obligation which rests upon men to pay their debts, modern legislation has abandoned the idea of requiring impossibilities of debtors. In the constitutional provisions above mentioned is evidenced a phase of this change of theory. The writ of *capias ad satisfaciendum* has been expressly abolished in some states.<sup>12</sup> The amelioration of the condition of poor debtors has also proceeded through the enactment of insolvency laws. But in construing legislation having this end in view, courts cannot keep too constantly in mind the fundamental theory upon which it is based, namely, that none of the exemptions thereby afforded debtors should enable them to avoid the payment of debts when able to pay

<sup>10</sup> *Livingston v. Los Angeles Co.* Supr. Ct., 117 Cal. 633; *Elkenberry v. Edwards*, 67 Ia. 619, 56 Am. Rep. 360; *State v. Becht*, 23 Minn. 411; *In re Knapp*, 144 Mo. 653; *Ex parte Clark*, 20 N. J. L. 648; *Moore v. Mullen*, 77 N. C. 328; *Kinney v. Laughenour*, 97 N. C. 325.

<sup>11</sup> *Ex parte Hardy*, 68 Ala. 339, Brickell, C. J., dissenting.

<sup>12</sup> Rev. St. Fla., 1891, § 1184; Code of W. Va., 1891, ch. 141, § 1.



them. Any considerable departure from this guiding principle might render necessary the enactment of a companion set of laws designed for the protection of creditors.

§ 452. Cases in Which It may Issue in New York.—By section 549 of the code of New York, “a defendant may be arrested in an action, where the cause of action is brought for either of the following causes: 1. To recover a fine or penalty;<sup>13</sup> 2. To recover damages for a personal injury;<sup>14</sup> an injury to property,<sup>15</sup> including

<sup>13</sup> If by statute an officer of a corporation becomes answerable for its debts because of his failure to file a report, an action to enforce such liability is not “to recover a fine or penalty.” *Glenn Falls Paper Co. v. White*, 58 How. Pr. 172. Nor is judgment for value of goods illegally imported a judgment for a penalty. *United States v. Moller*, 10 Ben. 189.

<sup>14</sup> “A personal injury includes libel, slander, criminal conversation, seduction, and malicious prosecution; also an assault and battery, false imprisonment, or other actionable injury to the person either of the plaintiff or of another.” Code N. Y., § 3333, subd. 9. This authorizes an arrest in an action for crim. con. (*Delamater v. Russell*, 4 How. Pr. 234; 2 Code R. 147; *Straus v. Schwarzwalden*, 4 Bosw. 627; *Breiman v. Paasch*, 7 Abb. N. C. 249); or for seduction (*Steinberg v. Lasker*, 50 How. Pr. 432; *Taylor v. North*, 3 Code R. 9; *Whiting v. Dow*, 42 Vt. 267; denied in *Wagner v. Lathers*, 26 Wis. 436); but not in an action for divorce on the ground of adultery. *McIntosh v. McIntosh*, 12 How. Pr. 289. An action to recover damages on account of the death of a deceased person is not one in which the defendant can be arrested. *Gibbs v. Larabee*, 23 Wis. 495; *Ryall v. Kennedy*, 52 How. Pr. 517. Defendant may be arrested in an action for libel on a private person or on a corporation (*Knickerbocker L. I. Co. v. Ecclesine*, 6 Abb. Pr., N. S., 9; 11 Abb. Pr., N. S., 385; *Britton v. Richards*, 18 Abb. Pr., N. S. 258); or for malicious prosecution (*Dempsey v. Lepp*, 52 How. 11).

<sup>15</sup> See *Keeler v. Clark*, 18 Abb. Pr. 154; *Niver v. Niver*, 43 Barb. 411; 19 Abb. Pr. 14; 29 How. Pr. 6; *Jananlique v. De Luc*, 1 Abb. Pr., N. S., 419; *Old Dominion S. S. Co. v. McKenna*, 18 Abb. N. C. 263. By section 3343, injury to property is defined as “an actionable act, whereby the estate of another is lessened, other than a personal injury or the breach of a contract.” Action to recover real estate, with damages for its detention, is not an action for injuries to property. *Merritt v. Carpenter*, 8 Keyes, 142; 33 How. Pr. 428;

the wrongful taking, detention, or conversion<sup>16</sup> of personal property; breach of promise to marry;<sup>17</sup> misconduct or neglect in office,<sup>18</sup> or in a professional employment;<sup>19</sup> fraud<sup>20</sup> or deceit;<sup>21</sup> or to recover a chat-

*Griswold v. Sweet*, 49 How. Pr. 171; but see *Welch v. Winterburn*, 14 Hun, 518, and *Bruce v. Kelly*, 5 Hun, 229, both of which maintain that the words "injury to property" include real as well as personal property.

<sup>16</sup> *Hovey v. McDonald*, 45 N. Y. Sup. Ct. 606; *Searing v. Goodstein*, 64 How. Pr. 427; 11 Abb. N. C. 450; *Person v. Civer*, 29 How. Pr. 432; *Cousland v. Davis*, 4 Bosw. 619; *Richtmeyer v. Remsen*, 38 N. Y. 206; *In re Mowry*, 12 Wis. 52; *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774. A defendant may be arrested where the property is converted in a foreign country, and then brought into this state. *Blason v. Bruno*, 21 How. Pr. 112; 33 Barb. 520; 12 Abb. Pr. 265; *Brown v. Ashbough*, 40 How. Pr. 226. But he cannot be arrested for taking, detaining, or injuring real estate. *Merritt v. Carpenter*, 8 Abb. App. 285; 2 Keyes, 462; 33 How. Pr. 428; *Brush v. Mullen*, 12 Abb. Pr. 242. If plaintiff elects to waive the tort, and sue for goods converted as goods sold and delivered, his election is irrevocable, and he cannot arrest defendant for their conversion. *Fields v. Bland*, 81 N. Y. 239; 8 Abb. N. C. 221. If partner or part owner takes the common property out of the state, he cannot be arrested in an action therefor. *Goodwin v. Griffin*, 88 N. Y. 629.

<sup>17</sup> But this does not authorize the arrest of a female. *Siefke v. Tappey*, 3 Code R. 23.

<sup>18</sup> *People v. Clark*, 45 How. Pr. 12. A defendant may be arrested for moneys collected by him as a public officer of a foreign state. *Peel v. Elliott*, 16 How. Pr. 485; 28 Barb. 200; 7 Abb. Pr. 433; *Republic of Mexico v. De Arangoiz*, 5 Duer, 643.

<sup>19</sup> For arrest of attorneys, see *Schadle v. Chase*, 16 How. Pr. 413; *Grant v. Chester*, 17 How. Pr. 260; 8 Abb. Pr. 357; *Yates v. Bloodgett*, 8 How. Pr. 278; *Cotton v. Sharpstein*, 14 Wis. 226, 80 Am. Dec. 774; *Gross v. Graves*, 2 Rob. 707; 19 Abb. Pr. 95; *Stage v. Stevens*, 1 Denio, 267.

<sup>20</sup> Appropriating property sent to defendant by mistake, or drawing from bank money credited to him by mistake, is a fraud, and he may be arrested in an action therefor. *Faris v. Peck*, 2 Sweeney, 689; 10 Abb. Pr., N. S., 55; *National Broadway Bank v. Miller*, 11 N. Y. Daily Reg. 119; 4 Week. Dig. 31.

<sup>21</sup> Arrest for deceit, when proper. *Ely v. Mumford*, 47 Barb. 629; *Redfield v. Frear*, 9 Abb. Pr., N. S., 449; *Hazlett v. Gill*, 19 Abb. Pr. 353; 4 Rob. 627; *Cormier v. Hawkins*, 69 N. Y. 188; *Bruce v. Kelly*, 5 Hun, 229.

tel, where it is alleged in the complaint that the chattel, or a part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken from the sheriff, and with intent that it should not be so found or taken, or to deprive the plaintiff of the benefit thereof,<sup>22</sup> or to recover for money received, or to recover property or damages for the conversion or misapplication of property, when it is alleged that the money was received, or the property was embezzled or fraudulently misapplied, by a public officer, or by an attorney, solicitor, or counselor, or by an officer or agent of a corporation or a banking association in the course of his employment, or by a factor, agent, broker, or other person in a fiduciary capacity.<sup>23</sup> Where such

<sup>22</sup> *Watson v. McGuire*, 33 How. Pr. 87; 2 Daly, 219; *Purchase v. Bellows*, 23 How. Pr. 421; 14 Abb. Pr. 357; *Tracy v. Veeder*, 35 How. Pr. 209; 50 Barb. 70; *Roberts v. Randel*, 3 Sand. 710; *Seymour v. Van Curen*, 18 How. Pr. 94. The gist of the cause for arrest under this subdivision is the concealment or removal of the property for the purpose of rendering the judgment and process ineffective. *Pike v. Lent*, 4 Sand. 650; *Barnett v. Selling*, 70 N. Y. 492; 3 Abb. N. C. 83. But such removal or concealment may have been consummated before the action was brought. *Barnett v. Selling*, 9 Hun, 236; *Nichols v. Michael*, 23 N. Y. 264, 80 Am. Dec. 259.

<sup>23</sup> As to the relations which are regarded as fiduciary, see *Wolfe v. Brouwer*, 5 Rob. 601; *Burhans v. Casey*, 4 Sand. 707; 1 Walt's Pr. 619; *Turner v. Thompson*, 2 Abb. Pr. 444; *Goodrich v. Dunbar*, 17 Barb. 644. A person acts in a fiduciary capacity when confidence is reposed in his integrity, rather than in his pecuniary ability (*Dunaher v. Meyer*, 1 Code R. 87; *Stoll v. King*, 8 How. Pr. 298; *Frost v. McCarger*, 14 How. Pr. 131); or when he is given money to purchase a particular thing, or to devote to a specified purpose (*Noble v. Prescott*, 4 E. D. Smith, 139). A factor or agent acts in a fiduciary capacity. *Duguid v. Edwards*, 50 Barb. 288; *Clark v. Pinckney*, 50 Barb. 226; *Ostell v. Brough*, 24 How. Pr. 274; *Barret v. Gracie*, 34 Barb. 20; *Ridder v. Whitlock*, 12 How. Pr. 208; *Schudder v. Shiells*, 17 How. Pr. 420; *Noble v. Prescott*, 4 E. D. Smith, 139; *Dubois v. Thompson*, 25 How. Pr. 417; *Robbins v. Seithel*, 20 How. Pr. 366. The relation between principal and agent may be such that the latter is authorized to use the funds of the former in his own business. If so, the pecuniary ability of the agent is

allegation is made, the plaintiff cannot recover, unless he proves the same on the trial of the action; and a judgment for the defendant is not a bar to the new action to recover the money or chattel; 3. To recover money, funds, credits, or property held or owned by the state, or held or owned, officially or otherwise, for or in behalf of a public or governmental interest, by a municipal or other public corporation, board, officer, custodian, agency, or agent of the state, or of a city, town, village, or other division, subdivision, department, or portion of the state, which the defendant has, without right, obtained, received, converted, or disposed of; or to recover damages for so obtaining, receiving, paying, converting, or disposing of the same;<sup>24</sup> 4. In an action upon contract, express or implied, other than a promise to marry, where it is alleged in the complaint that the defendant was guilty of a fraud<sup>25</sup> in contracting

evidently relied upon, rather than the relation of trust and confidence; and he cannot be arrested as holding the funds of his principal in a fiduciary capacity. *McBurney v. Martin*, 6 Rob. 502; *Angus v. Dunscomb*, 8 How. Pr. 14; *Bussing v. Thompson*, 15 How. Pr. 97; 6 Duer, 696; *Sutton v. De Camp*, 4 Abb. Pr., N. S., 483. An assignee for the benefit of creditors acts in a fiduciary capacity. *Roberts v. Prosser*, 53 N. Y. 260. A banker cannot be arrested for moneys left with him on general deposit. *Buchanan F. O. Co. v. Woodman*, 1 Hun, 639.

<sup>24</sup> *People v. Tweed*, 5 Hun, 382.

<sup>25</sup> An actual intent to defraud should be established. *Hoyt v. Godfrey*, 88 N. Y. 669. Legal or constructive fraud, when existing apart from an intent to defraud, will not warrant an arrest. *Hathaway v. Johnson*, 55 N. Y. 93, 14 Am. Rep. 186; *Birchell v. Strauss*, 28 Barb. 293; *Gaffney v. Burton*, 12 How. Pr. 516; *Robinson v. Flint*, 58 Barb. 100. As to what will be regarded as fraud in contracting a debt or incurring an obligation, see *Stewart v. Potter*, 37 How. Pr. 68; *Harding v. Shannon*, 20 How. Pr. 25; *Brooklyn D. U. v. Hayward*, 11 Abb. Pr., N. S., 235; *Morrison v. Garner*, 7 Abb. Pr. 425; *Wallace v. Murphy*, 22 How. Pr. 414. A defendant may be arrested for false and fraudulent representations concerning his own pecuniary ability, by which he obtained property on credit (*Wilmerding v. Cohen*, 8 Abb. Pr., N. S., 141; *Wannemacher v. Davis*, 2

or incurring the liability;<sup>26</sup> or that he has, since the making of the contract, or in contemplation of making the same, removed or disposed of his property with intent to defraud his creditors, or is about to remove or dispose of the same with like intent; but where such an allegation is made, the plaintiff cannot recover unless he proves the fraud on the trial of the action; and a judgment for the defendant is not a bar to a new action to recover upon the contract only.”

Sweeney, 272; Sharp v. Mayor of New York, 40 Barb. 256; Scudder v. Barnes, 16 How. Pr. 534; Freeman v. Leland, 2 Abb. Pr. 479; Wilmerding v. Mooney, 11 Abb. Pr. 283; 1 E. D. Smith, 261; Smith v. Jones, 4 Robt. 655); also for like representations concerning the solvency of a third person (Hazlett v. Gill, 4 Robt. 627; 19 Abb. Pr. 353; Smith v. Corblere, 3 Bosw. 634; Sherman v. Brantley, 7 Robt. 55); and also for a fraudulent warranty (Fowler v. Abrams, 3 E. D. Smith, 1). The misrepresentation on account of which defendant is arrested must have been material, and must have been believed by the person to whom it was made. Clark v. Rankin, 46 Barb. 570; Smith v. Jones, 4 Robt. 655. The mere insolvency of the defendant when he contracted the debt will not warrant his arrest for fraud, if he made no misrepresentations, and expected to be able to make payment. Mitchell v. Worden, 20 Barb. 253; Hennequin v. Naylor, 24 N. Y. 139; Nichols v. Michael, 27 N. Y. 264, 80 Am. Dec. 259. But if a party purchases property on credit, who is notoriously and hopelessly insolvent, or if he fraudulently conceals his insolvency, the transaction is fraudulent, and he is liable to arrest. Van Kleek v. Leroy, 4 Abb. Pr., N. S., 431; 4 Trans. App. 295; Morrison v. Garner, 7 Abb. Pr. 425; Byrd v. Hall, 2 Keyes, 646; Johnson v. Monell, 2 Keyes, 655; Gaffney v. Burton, 12 How. Pr. 516; Wright v. Brown, 67 N. Y. 1. The fact that the defendant purchased property on credit, and immediately sold it at a reduced price, is evidence of a fraudulent intent on his part. Manning v. Solis, 50 Barb. 224. The same rule applies where defendant obtains a loan on his promise to apply the money to a specified use, and then applies it to a different use. Lovell v. Martin, 11 Abb. Pr. 126. The defendant may be arrested in this state for a debt fraudulently contracted in another state. Brown v. Ashbough, 40 How. Pr. 226.

<sup>26</sup> It will be observed, from the language of this subdivision, that the mere removal or disposal of property is no ground for an arrest, unless it was coupled with an actual intent to defraud. The existence of such intent must therefore be shown. Kern v. Rachow, 12

Section 550 of the same code declares that "a defendant may also be arrested, in an action wherein the judgment demanded requires the performance of an act, the neglect or refusal to perform which would be punishable by the court as a contempt, where the defendant is not a resident of the state, or, being a resident, is about to depart therefrom, by reason of which nonresidence or departure there is danger that a judgment or order requiring the performance of the act will be rendered ineffectual."<sup>27</sup>

By other sections of the same code the right to execution against the person of the defendant is granted: "1. Where the plaintiff's right to arrest the defendant depends upon the nature of the action; 2. In any other case, where an order of arrest has been granted and executed in the action, and if it was executed against the judgment debtor, where it has not been vacated."<sup>28</sup> "But an execution cannot be issued against the person of a woman unless an order of arrest has been granted and executed in the action, and, if it was executed

Abb. Pr., N. S., 352; 2 Jones & S. 239; Vredenburg v. Hendricks, 17 Barb. 79; Krauth v. Vial. 10 Abb. Pr. 139; Flour City N. B. v. Hall, 33 How. Pr. 1; Watson v. McGuire, 33 How. Pr. 87; 2 Daly, 219; Hathorn v. Hall, 4 Abb. Pr. 227; Courter v. McNamara, 9 How. Pr. 255; Phillips v. Benedict, 33 Barb. 655; 12 Abb. Pr. 355; 20 How. Pr. 265; Roberts v. Randel, 3 Sand. 707; 5 How. Pr. 327; Pike v. Lent, 4 Sand. 650; People v. Kelly, 35 Barb. 444; 13 Abb. Pr. 405; Caldwell's Case, 13 Abb. Pr. 405; Birchell v. Strauss, 28 Barb. 293; Pac. M. Ins. Co. v. Machado, 16 Abb. Pr. 451; Spies v. Joel, 1 Duer. 669.

<sup>27</sup> Section 550 of the N. Y. Code of Civil Procedure, as quoted above, consists only of what was its fourth subdivision prior to the amendments of 1886. By those amendments subdivisions 1, 2, and 3 were transferred to the code section immediately preceding. Section 550, as it now stands, is intended as a substitute for the writ of ne exeat which is expressly abolished by § 548 of the same code. *Ensign v. Nelson*, 49 Hun. 215.

<sup>28</sup> N. Y. Code, § 1487.

against the judgment debtor, has not been vacated.”<sup>29</sup> “Unless the judgment debtor is actually confined, without having been admitted to the liberties of the jail by virtue of an execution against his person, issued in another action, or of an order of arrest, or a surrender by his bail in the same action, an execution against his person cannot be issued until an execution against his property has been returned wholly or partly unsatisfied. If he is a resident of the state, the execution against his property must have been issued to the county where he resides.”<sup>30</sup>

It seems obvious that one person ought not to be chargeable for the fraud of another, in which he did not participate, and which he neither conceived or ratified. Hence while a principal may be arrested for fraudulent misrepresentations made by his agent by his authority,<sup>31</sup> he cannot be arrested where the representations were unauthorized.<sup>32</sup> It has nevertheless been held, in several instances, that all the members of a partnership were liable to be arrested and held under execution for fraudulent misrepresentations made by one of their number.<sup>33</sup> We think these decisions are entirely indefensible, unless the fraudulent act has been ratified.<sup>34</sup>

<sup>29</sup> Ibid., § 1488.

<sup>30</sup> Ibid., § 1489.

<sup>31</sup> Smith v. Frank, 2 Rob. 626.

<sup>32</sup> Clafin v. Frank, 8 Abb. Pr. 412.

<sup>33</sup> Sherman v. Smith, 42 How. Pr. 198; Coman v. Allen, 21 How. Pr. 114; Anonymous, 6 Abb. Pr. 319, note; Bull v. Melliss, 9 Abb. Pr. 58; Townsend v. Bogart, 11 Abb. Pr. 355; Hawkins v. Appleby, 2 Sand. 421.

<sup>34</sup> Wetmore v. Earle, 9 Abb. Pr. 58, note; Hanover Co. v. Sheldon, 9 Abb. Pr. 240; Nat. Bank v. Temple, 39 How. Pr. 432; 2 Sweeney, 344; Woodruff v. Valentine, 19 Abb. Pr. 93; Clafin v. Frank, 8 Abb. Pr. 412; Hitchcock v. Peterson, 14 Hun, 389.



If, in New York, an action is brought upon a cause of action upon which execution could issue against the defendant, if the plaintiff recovers judgment, then execution may issue against the person of the latter for the costs, if the former prevails in the suit,<sup>35</sup> although he is defeated on a mere technicality.<sup>36</sup> A plaintiff who unites in one suit causes of action under which the defendant can, with those under which he cannot, be arrested, waives the right to an execution against the person.<sup>37</sup> In all cases in which the plaintiff is entitled to an order of arrest, under sections 549 and 550 of the code, an execution may, by section 1487, issue against the person of the judgment debtor to any county within the jurisdiction of the court, after the return of an execution unsatisfied in whole or in part.

**§ 453. Cases in Which It may Issue without a Prior Order of Arrest.**—In most instances in which a defendant is liable to be taken in execution, he is also liable to arrest at the commencement of the action. The more usual practice is to arrest the defendant in the first instance, and to retain him in custody, or require him to give bail to the effect that he will render himself amenable to any judgment that may be entered against him in the suit. In some cases this preliminary arrest must be made, or the plaintiff will be regarded as irrevocably waiving his right to imprison

<sup>35</sup> *Corwin v. Freeland*, 6 N. Y. 560; *Brown v. Brockett*, 55 How. Pr. 32; *Parce v. Halbert*, 1 How. Pr. 235; *Hovey v. Sarr*, 42 Barb. 435; *Kloppenbergh v. Neefus*, 4 Sand. 655; *Miller v. Scherder*, 2 N. Y. 262; *Knapp v. Murphy*, 20 App. Div. 83.

<sup>36</sup> *Parker v. Spear*, 62 How. Pr. 394.

<sup>37</sup> *Bowen v. True*, 53 N. Y. 640; *Goodale v. Finn*, 2 Hun, 151; *Lambert v. Snow*, 2 Hilt. 501; 9 Abb. Pr. 91; 17 How. Pr. 517; *Toffey v. Williams*, 3 Hun, 217; *McGovern v. Payn*, 32 Barb. 83; *Mason v. Lambert*, 3 Daly, 250; *Molenaer v. Koerner*, 13 Abb. Pr. 241, note; *State v. Helms*, 101 Wis. 280.



the defendant. The rules upon this subject in New York, and in other states having a similar code of procedure, are these: 1. That if an order of arrest has been obtained, and the defendant taken into custody, the plaintiff will be entitled to an execution against the body of the defendant, unless the order has been vacated, although the record in the case does not show that he is entitled to such a writ;<sup>38</sup> 2. If facts stated in the complaint, and necessary to support the judg-

<sup>38</sup> *Lovee v. Carpenter*, 3 Abb. Pr., N. S., 309; *Smith v. Knapp*, 30 N. Y. 581; *Corwin v. Freeland*, 6 N. Y. 560; *Elwood v. Gardner*, 45 N. Y. 349; 10 Abb. Pr., N. S., 238; *Crowell v. Brown*, 17 How. Pr. 68; 9 Abb. Pr. 107, note; *Fake v. Edgerton*, 5 Duer, 681; 3 Abb. Pr. 229; *Cheney v. Garbutt*, 5 How. Pr. 467; 1 Code R., N. S., 166; *How v. Frear*, 21 How. Pr. 343; 13 Abb. Pr. 241. This rule was directly repudiated by the supreme court of California, per Field, J., in *Davis v. Robinson*, 10 Cal. 411. That was an action upon contract. On the commencement of the action, the defendant was arrested upon affidavit of the plaintiff alleging that defendant was about to depart from the state with intent to defraud his creditors, and had disposed of his property with like intent. Upon issue made in defendant's denial in a counter-affidavit, the court found against the defendant upon the charge of a fraudulent disposition of his property, ordered judgment for plaintiff for the amount demanded in the complaint, and that plaintiff have execution against the body of the defendant. In reversing this order in so far as the finding of fraud and the award of execution were concerned, the court said in part: "To authorize a judgment convicting the defendant of fraud, the facts upon which the charge is based must be specifically alleged in the complaint. A judgment is the determination of the rights of the parties upon the facts pleaded, and it cannot in any event exceed the relief warranted by the case stated in the complaint. Execution against the person, unlike an execution against the property of the defendant, which follows as a matter of course upon a money judgment, can only issue upon direction of the court to that effect, based upon the special facts found, and such facts cannot be considered by the jury unless averred in the pleadings. Side issues upon affidavits are not the issues upon which juries pass. The arrest upon affidavit is only intended to secure the presence of the defendant until final judgment; and in order to detain and imprison his person afterward, the fraud must be alleged in the complaint, be passed upon by the jury, and be stated in the judgment." See, also, *Payne v. Elliott*, 54 Cal. 339, 35 Am. Rep. 80.

ment, import that the defendant is liable to arrest, then he may be taken in execution, though not arrested before judgment;<sup>39</sup> 3. If the defendant is liable to arrest, owing to some fact which is not indispensable to the plaintiff's cause of action, he must be arrested prior to the judgment, or the plaintiff will waive his right to arrest, although the cause of arrest is stated in the complaint.<sup>40</sup> Judgment having been ren-

<sup>39</sup> *Richtmeyer v. Remsen*, 38 N. Y. 206; 6 Trans. App. 203; *Niver v. Niver*, 19 Abb. Pr. 14; 43 Barb. 411; 29 How. Pr. 6; *Wood v. Henry*, 40 N. Y. 124; *Ginochio v. Figari*, 4 E. D. Smith, 227; *Elwood v. Gardner*, 45 N. Y. 349; 10 Abb. Pr., N. S., 238; *Shuman v. Strauss*, 52 N. Y. 404; *Eames v. Stevens*, 26 N. H. 117; *Hunt v. Burdick*, 42 Vt. 610; *Keeler v. Clark*, 18 Abb. Pr. 154; *Church of the Redeemer v. Crawford*, 14 Abb. Pr., N. S., 200; *Gibbs v. Hickborn*, 12 Hun, 480; *Catlin v. Adirondack Co.*, 20 Hun, 19; *Neflet v. Lightstone*, 77 N. Y. 96; *Lockwood v. Van Slyke*, 18 How. Pr. 45; *Gross v. Graves*, 2 Robt. 707; *Roberts v. Prosser*, 53 N. Y. 262; *Peebles v. Foote*, 83 N. C. 102; *Winton v. Knott*, 7 S. D. 179.

<sup>40</sup> *Atocha v. Garcia*, 15 Abb. Pr. 303; 24 How. Pr. 186; *Elwood v. Gardner*, 45 N. Y. 349; 10 Abb. Pr., N. S., 238; *Kedenburgh v. Morgan*, 4 Bosw. 646; *Prouty v. Swift*, 51 N. Y. 594; *Lembke's Case*, 11 Abb. Pr., N. S., 72; *Neflet v. Lightstone*, 77 N. Y. 96. Before an order of arrest can issue prior to judgment, it must be made to appear to the judge, by affidavit, that a sufficient cause of action exists, and that the case is one in which an arrest is authorized by statute. *Pindar v. Black*, 2 Code R. 53; 4 How. Pr. 95; *Smith v. Jones*, 4 Robt. 656. The affidavit may be made on information and belief; but when so made, it must set forth the sources of information, the affiant's belief therein, and all the facts and circumstances constituting his information and giving rise to his belief. *Whitlock v. Roth*, 5 How. Pr. 143; *Crandall v. Bryan*, 5 Abb. Pr. 162; 15 How. Pr. 48; *Moore v. Calvert*, 9 How. Pr. 474; 1 Wait's Pr. 636-645; *City Bank v. Lumley*, 28 How. Pr. 397; *Union Bank v. Mott*, 9 Abb. Pr. 106; *Bell v. Mall*, 11 How. Pr. 255; *Peel v. Elliott*, 16 How. Pr. 481; *Cook v. Roach*, 21 How. Pr. 152; *Satow v. Reisenberger*, 25 How. Pr. 164; *De Woerth v. Fieldner*, 16 Abb. Pr. 296; *De Nierth v. Seldner*, 25 How. Pr. 419. In all cases the affidavit should state the facts which are claimed to warrant the arrest, and not the legal conclusion which the affiant draws from those facts. *Vanderpool v. Kissam*, 4 Sand. 715; *Gould v. Sherman*, 10 Abb. Pr. 411; *Frost v. Willard*, 9 Barb. 440; *Courter v. McNamara*, 9 How. Pr. 255. In truth, the decisions upon this subject seem to require a statement

dered, execution against the person may issue, as a matter of course, without a special order of court, where the cause of action and the cause of arrest are identical,<sup>41</sup> or where, though the grounds of arrest rest in facts extrinsic and immaterial to the cause of action, a previous order of arrest has been obtained and remains in force.<sup>42</sup>

of the evidence, rather than of the ultimate facts. Defects in the affidavit are waived by giving bail. *Ballouhey v. Cudot*, 3 Abb. Pr. N. S., 122; *Stewart v. Howard*, 15 Barb. 26; *Dale v. Radcliffe*, 15 How. Pr. 71; 25 Barb. 333. The plaintiff must also file an undertaking in the form and amount prescribed by statute. It need not be signed by anyone but the sureties thereon. *Askins v. Hearn*, 3 Abb. Pr. 184; *Bellinger v. Gardner*, 2 Abb. Pr. 441; *Leffingwell v. Chave*, 19 How. Pr. 54. A defendant, after his arrest on mesne process, may procure his release by giving an undertaking with two or more sufficient bail, to the effect that he will at all times render himself amenable to the process of the court. If the bail become liable, they must pay the whole amount of the judgment. They cannot diminish the amount of their liability by showing that the defendant was and is wholly and irretrievably insolvent. *Levy v. Nicholas*, 19 Abb. Pr. 282; *Gallarati v. Orser*, 4 Bosw. 94; *Willet v. Lassalle*, 19 Abb. Pr. 272; *Bensel v. Lynch*, 2 Robt. 448; *McArthur v. Pease*, 46 Barb. 423. Nor can they escape their liability on the ground that their principal was not subject to arrest, nor because the order of arrest was illegal. *Gregory v. Levy*, 12 Barb. 610; 7 How. Pr. 37; *Jewett v. Crane*, 35 Barb. 208; *Kelley v. McCormick*, 28 N. Y. 318; *Bensel v. Lynch*, 44 N. Y. 102. Putting in special bail waives process, and all defects therein. *Wright v. Jeffrey*, 5 Cow. 15; *Dale v. Radcliff*, 15 How. Pr. 71; *Pixley v. Winchell*, 7 Cow. 366, 17 Am. Dec. 525; *Gaffney v. Burton*, 12 How. Pr. 516; *Lewis v. Truesdell*, 3 Sand. 706.

<sup>41</sup> *Corwin v. Freeland*, 6 N. Y. 566; *Alden v. Sarson*, 4 Abb. Pr. 102; *Humphrey v. Brown*, 17 How. Pr. 481; *Koppenberg v. Neefus*, 4 Sandf. 655; *Hermann v. Sherin*, 8 S. D. 36, 59 Am. St. Rep. 744, where it was said: "While we think that it might be a safer practice to obtain an order in such a case, we find nothing in the statute indicating that such leave is necessary. In respect to issuance by the clerk, the statute seems to make no distinction against property and an execution against the person." In *Lockwood v. Van Slyke*, 18 How. Pr. 45, it is said that a plaintiff exercising his right to issue a ca. sa. without special order of court acts at his peril.

<sup>42</sup> *Humphrey v. Brown*, 17 How. Pr. 481; *Elwood v. Gardner*, 45 N. Y. 349; *Fake v. Edgerton*, 3 Abb. Pr. 229; *Bull v. Mellis*, 13 Abb. Pr. 241.

The complaint may state facts sufficient to constitute a cause of action and to entitle the plaintiff to a recovery, and may aver the existence of additional facts of a character to justify the defendant's arrest. In such a case, the nature of the action does not entitle plaintiff to an execution against defendant's person, for the additional facts are not material to the action. Therefore, if judgment is entered in favor of plaintiff, upon a complaint showing the defendant to be indebted for moneys had and received in a fiduciary capacity, an execution cannot issue against the person of the latter unless he was arrested during the pendency of the action.<sup>43</sup> Such facts should not properly be set forth in the complaint, nor is proof of them necessary to sustain the cause of action.<sup>44</sup> It is only when the judgment cannot be supported, except by proof of facts warranting the arrest of the defendant, that execution can issue against his person, unless an order for his arrest was issued and executed before judgment, and remains unvacated.<sup>45</sup> An order of arrest issued, prior to judgment, against two defendants, but executed against only one, will support a body execution against the same defendant, after judgment, where the cause of arrest is extrinsic to the cause of action.<sup>46</sup> If a cause of action upon which an arrest

<sup>43</sup> *Segelken v. Meyer*, 94 N. Y. 473; *Chapin v. Foster*, 101 N. Y. 1; compare *Gibbs v. Hichborn*, 12 Hun, 480.

<sup>44</sup> *Elwood v. Gardner*, 45 N. Y. 349; *Atocha v. Garcia*, 24 How. Pr. 186; *Graves v. Walte*, 59 N. Y. 156; *Shuman v. Strauss*, 52 N. Y. 407.

<sup>45</sup> *McKay v. Draper*, 19 Abb. Pr. 306, note; *Prouty v. Swift*, 51 N. Y. 594; *Sherman v. Grinnell*, 159 N. Y. 50. An order of arrest having been vacated before judgment, the right to an execution against the person after judgment stands upon the same ground as if the vacated order had never been made. *Stelle v. Palmer*, 11 Abb. Pr. 62.

<sup>46</sup> *Whitman v. James*, 62 How. Pr. 132.

may be made is united with one upon which an arrest is unauthorized, and judgment is entered upon both, execution cannot issue against defendant's person.<sup>47</sup>

§ 453 a. **Affidavit and Moving Papers.**—As a prerequisite to the issuance of execution against the person, it is required by the statutes of most states that the grounds for such issuance be first properly presented to the court by affidavit or moving papers. These statutory provisions being numerous and diverse, we shall not attempt to treat them fully in this section. When the filing of such affidavit or moving papers is necessary, the statutory provisions relating thereto must be strictly complied with.<sup>48</sup> Whether or not such filing is necessary in all cases depends entirely upon the statute. In some jurisdictions it is necessary to file an affidavit only in specified cases, while in others it is required in all cases.<sup>49</sup> In New York, where the order of arrest is sought prior to judgment, it must be made to appear to the judge by affidavit that a cause of action exists which justifies the issuance of the order.<sup>50</sup> Where the order is sought after judgment rendered, the nature of the case may make its issuance a matter of course,<sup>51</sup> in which event no new affidavit is necessary.<sup>52</sup> Where the cause of

<sup>47</sup> *Pam v. Vilmar*, 52 How. Pr. 238.

<sup>48</sup> *Gorton v. Frizzell*, 20 Ill. 291; *Tuttle v. Wilson*, 24 Ill. 553; *Dozier v. Dozier*, 30 Ga. 523.

<sup>49</sup> *Fromberger v. Karsner*, 1 Houst. (Del.) 290; *In re Heath*, 40 Kan. 333; *Atwood v. Wheeler*, 149 Mass. 96; *Williams v. Shillaber*, 153 Mass. 541.

<sup>50</sup> *Pindar v. Black*, 2 Code R. 53; 4 How. Pr. 95; *Smith v. Jones*, 4 Robt. 656.

<sup>51</sup> See ante, § 453.

<sup>52</sup> *Stewart v. Cunningham*, 22 Ala. 626; *Davis v. Dorr*, 30 Vt. 97; *Converse v. Washburn*, 43 Vt. 129. But a contrary rule is adhered to in New Hampshire where it is held that a ca. sa. cannot

action and the cause of arrest are identical, a judgment in favor of the plaintiff is ordinarily conclusive of his right to execution against defendant's person, and no new affidavit is required.<sup>53</sup>

The affidavit must be made by the person designated by statute, if there be any statutory designation in this regard,<sup>54</sup> and may be sworn to before any person authorized to administer oaths.<sup>55</sup> While an affidavit in the alternative is fatally defective,<sup>56</sup> as, where plaintiff made affidavit concerning the defendant "that he withholds his money or secretes his property from the officers, so that the debt cannot be levied," it is not invalidated by a mere grammatical error which does not cloud the sense.<sup>57</sup> Defects which are merely formal may be allowed by the court, in its discretion, to be cured by amendment.<sup>58</sup> The essential contents of the

issue in any event after judgment except upon affidavit. Although there may have been an affidavit on the writ, there still must be an affidavit on the execution. "A long time may have elapsed," says the supreme court of that state, "between the commencement of the suit and the recovery of judgment. Circumstances may have changed, and that which the plaintiff might conscientiously have sworn to when his action was brought may no longer be true in his belief." *Janes v. Miller*, 21 N. H. 371. "It would be a hardship from which the statute was intended to protect the debtor, if he could be arrested on execution, while no suspicion or ground of suspicion existed, merely because, at a day long before, his creditor had seen cause to hold such suspicion." *Kidder v. Farrar*, 20 N. H. 320; *Naramore v. Miller*, 21 N. H. 367; *Jacobs v. Stevens*, 57 N. H. 610, 618.

<sup>53</sup> *Peebles v. Foote*, 83 N. C. 102; *Elwood v. Gardner*, 45 N. Y. 349. Compare *Davis v. Robinson*, 10 Cal. 411; *People v. Healy*, 128 Ill. 9, 15 Am. St. Rep. 90.

<sup>54</sup> *In re Heath*, 40 Kan. 333.

<sup>55</sup> *Fergus v. Hoard*, 15 Ill. 357. Compare *Harat v. Jackel*, 59 Ill. 140.

<sup>56</sup> *Gorton v. Frizzell*, 20 Ill. 291.

<sup>57</sup> *Abbott v. Tucker*, 4 Allen (Mass.), 72; *Kellogg v. Leach*, 162 Mass. 45.

<sup>58</sup> *Doty v. Colton*, 90 Ill. 453.

affidavit vary with the statute under which it is drawn and the ground upon which the issuance of execution is sought. It may be made on information and belief, in which case it must set forth fully the sources of affiant's information and his belief therein.<sup>59</sup> In general, it may be said that the affidavit should show that a fieri facias has proven, or must prove, for reasons therein set forth, ineffectual to enforce plaintiff's rights against defendant, and the fraud relied upon to justify the arrest should be set forth with clearness and formality.<sup>60</sup>

§ 454. When the Writ may Issue.—The principles stated in the chapter on "Issuing the Original Execution" are, in the main, applicable to the issue of writs of *capias ad satisfaciendum* in those states where those principles have not been modified or subverted by statute. At the common law, a plaintiff might, at the same time, issue a fieri facias and a *capias ad satisfaciendum*. The mere issue of either writ did not debar the plaintiff from having the benefit of the other.<sup>61</sup> But if a fieri facias issued, and the officer did anything by virtue of its authority which might make it necessary for him to rely upon the writ to avoid prosecution as a trespasser, then a *capias ad satisfaciendum* could not issue, or, if issued, could not be executed until after

<sup>59</sup> *De Woerth v. Felldner*, 16 Abb. Pr. 295; *Moore v. Calvert*, 9 How. Pr. 474; 1 Walt's Pr. 636-645; *City Bank v. Lumley*, 29 How. Pr. 397; *Union Bank v. Mott*, 9 Abb. Pr. 106; *Bell v. Mall*, 11 How. Pr. 255; *Cook v. Roach*, 21 How. Pr. 152.

<sup>60</sup> *Doty v. Colton*, 90 Ill. 453; *Noyes v. Manning*, 162 Mass. 14; *Magruder v. Shelton*, 98 N. C. 545. 2 Am. St. Rep. 349; *Fergus v. Hoard*, 15 Ill. 357; *Dozier v. Dozier*, 30 Ga. 523.

<sup>61</sup> Ante, § 31; *Dicas v. Warne*, 10 Bing. 341; 3 Moore & S. 814; 2 Dowl. P. C. 762. Contra, *Craig v. Adair*, 22 Ga. 373; *Stamper v. Hodson*, 8 Mod. 303.



the return of the fieri facias.<sup>62</sup> Taking the body under a capias ad satisfaciendum, or making a levy upon property under a fieri facias, operates as a conditional or prima facie satisfaction of plaintiff's judgment. Therefore, where the two writs are issued simultaneously, plaintiff cannot execute both at the same time, and thus procure a double satisfaction of his debt.<sup>63</sup> If a sheriff has two writs of fieri facias in his hands, issued in favor of different plaintiffs against the same defendant, a levy under one of them, though constructively a levy under the other also, does not preclude the plaintiff, whose writ was not directly levied, from suing out a capias ad satisfaciendum.<sup>64</sup>

In the United States, the issuing of executions against the body of a defendant is so dependent on diverse statutes that we shall not undertake to treat of it fully.<sup>65</sup> In some states, although warranted by the

<sup>62</sup> *Andrews v. Saunderson*, 1 Hurl. & N. 725; 3 Jur., N. S., 118; 26 L. J. Ex. 208; *Miller v. Parnell*, 2 Marsh. 78; 6 Taunt. 370; 40 El. & E. 436; *Wilson v. Kingston*, 2 Chit. 203; *Turner v. Walker*, 3 Gill & J. 377, 22 Am. Dec. 329; *Cutler v. Colver*, 3 Cow. 30; *Wheeler v. Bouchelle*, 5 Ired. 584; *Burk v. McFall*, 2 Browne, 143. But though a partial satisfaction has been produced by a fieri facias, its return authorizes the issue of a capias ad satisfaciendum. *Olcott v. Lilly*, 4 Johns. 407; *Gardner v. Cover*, 1 Gale, 45. Where a fieri facias had been levied, its return before its return day was held not to authorize the issue of a capias ad satisfaciendum. *Turner v. Walker*, 3 Gill & J. 377, 22 Am. Dec. 329; *Lawes v. Codrington*, 1 Dowl. P. C. 30.

<sup>63</sup> *Miller v. Bagwell*, 3 McC. (S. C.) 429; *State v. Gingnard*, 1 McC. (S. C.) 176; *Mazyck v. Coll*, 2 Ball. (S. C.) 101.

<sup>64</sup> *Smith v. Jackson*, 4 Fost. & F. 352. In one instance, a plaintiff was allowed to release a levy under fieri facias, and take the defendant under a capias ad satisfaciendum. *Knight v. Coleby*, 5 Mees. & W. 274. But this will rarely be permitted. *Bank of Pennsylvania v. Latshaw*, 9 Serg. & R. 9.

<sup>65</sup> *United States v. Reid*, 17 Fed. Rep. 497; *Kinney v. Laughenour*, 97 N. C. 325. The issue of such execution is generally permissible in actions of tort. *Ex parte Hardy*, 68 Ala. 303; *Sawyer v. Nelson*, 44 Ill. App. 184; *Dougherty v. Gardner*, 58 How. Pr. 284; *Long v.*



judgment, no *capias ad satisfaciendum* can issue unless the defendant has no property subject to execution,<sup>66</sup> or unless an execution against his property has

McLean, 88 N. C. 3; Hunt v. Burdick, 42 Vt. 610; Pomeroy v. Crocker, 4 Chand. (Wis.) 174. Under various statutes executions against the person have been issued and such issuance approved on judgments for the conversion of personal property (Hormann v. Sherin, 8 S. D. 36, 59 Am. St. Rep. 744); trover (Eames v. Stevens, 26 N. H. 117; In re Mowry, 12 Wis. 52); injury to property (Niver v. Niver, 43 Barb. 411; Welch v. Winterburn, 14 Hun, 518); trespass for an assault (In re Mullin, 118 Ill. 551; Pease v. Pendell, 57 Mich. 315); accidental injury to the person (Judd v. Ballard, 66 Vt. 668); seduction (Kinney v. Laughenour, 97 N. C. 325; Whiting v. Dow, 42 Vt. 262); unlawful detainer (Toal v. Clapp, 64 Wis. 223); bastardy (McLaughlin v. Whitten, 32 Me. 21; State v. Brewer, 38 S. C. 263, 37 Am. St. Rep. 752); case in the nature of conspiracy (Kalbfus v. Rundell, 134 Pa. St. 102); neglect or misconduct in professional employment (Stage v. Stevens, 1 Denio. 267; Wills v. Kane, 2 Grant's Cas. (Pa.) 60); ejectment (Howland v. Needham, 10 Wis. 495; Sheeran v. Rockwood, 67 Vt. 82. Contra. Fullerton v. Fitzgerald, 18 Barb. 441. Compare Lane v. Gover, 1 Har. & J. (Md.) 459; Merritt v. Carpenter, 30 Barb. 61); on a replevin bond (Scott v. Maupin, Hard. (Ky.) 129). A judgment for tort, though recovered in an action *ex contractu* will support an execution against the person under the Illinois statute. Barney v. Chapman, 21 Fed. Rep. 903. Such execution regularly issues to enforce the payment of fines or penalties imposed by law. Chicago v. Kenney, 35 Ill. App. 57; Excise Commrs. v. Harvey, 39 How. Pr. 191; Parce v. Halbert, 1 How. Pr. 235. Constitutional prohibitions against imprisonment for debt apply especially to actions purely *ex contractu*. Where, however, the element of fraud, either in assuming an obligation or in avoiding its performance, enters into and becomes a material part of, the cause of action thereon, a judgment in favor of the plaintiff entitles him to execution against the person of the defendant. Stewart v. Levy, 36 Cal. 159; May v. Hammond, 146 Mass. 439; People v. Healey, 128 Ill. 9, 15 Am. St. Rep. 242; Ex parte Clark, 20 N. J. L. 648, 45 Am. Dec. 394; Barker v. Russell, 11 Barb. 303; Keene, Petitioner, 15 R. I. 294; Brown v. Walk, 8 Ired. (N. C.) 517. Fraud in avoiding payment of a judgment debt justifies an order of arrest. Baker v. State, 109 Ind. 47. It is essential that the false representations constituting the fraud relate to some material existing fact or facts, and not to the future intention of the defendant which he may or may not perform. People v. Healy, 128 Ill. 9, 15. 15 Am. St. Rep. 242. Compare Maxon v. Gray, 15 R. I. 474.

<sup>66</sup> Berry v. Hamill, 12 Serg. & R. 210; Allison v. Rheam, 3 Serg. & R. 142, 8 Am. Dec. 644; Bulkley v. Finch, 37 Conn. 75.

been returned unsatisfied.<sup>67</sup> The latter requirement, however, is intended for the benefit of the judgment debtor, and he may waive a compliance therewith.<sup>68</sup> The return of an execution unsatisfied, although made by direction of plaintiff's attorney, will support a *capias* where it shows that the sheriff, before making it, made efforts to collect the execution, demanded, and was unable to find, property of the defendant with which to satisfy the writ.<sup>69</sup> In Illinois, in order that a judgment may support an execution against the person, it must be based upon a jury trial or an effective waiver thereof.<sup>70</sup>

Sometimes the plaintiff's right to an execution against the person of the defendant is disputed on the ground that he has waived it by accepting a new cause of action, upon which no arrest can be made, in lieu of the original cause of action upon which he was entitled to take the defendant in execution. The authorities on this subject are not all reconcilable, but the rule best sustained by reason and authority is this: That if the plaintiff, with full knowledge of the facts, takes a new obligation, and receives it in satisfaction of the old liability, then the right to arrest, which was coupled with the old obligation, is relinquished.<sup>71</sup> If,

<sup>67</sup> *Noe v. Christle*, 15 Abb. Pr., N. S., 346; *Wood v. Henry*, 40 N. Y. 124; *Scott v. Shaw*, 13 Johns. 378; *McDonald v. Wilke*, 13 Ill. 22; *Baker v. State*, 109 Ind. 47; *Bergman v. Noble*, 45 Hun, 133; *Kinney v. Laughenour*, 97 N. C. 328; *Patton v. Gash*, 99 N. C. 280; *In re Mowry*, 12 Wis. 52; *Norman v. Manciette*, 1 Saw. 484.

<sup>68</sup> *New York Guaranty etc. Co. v. Roberts*, 71 N. Y. 377. Compare *Pinkerton v. Gilbert*, 22 Ill. App. 568.

<sup>69</sup> *Huntington v. Metzger*, 158 Ill. 272. The terms of a judgment for a fine may be such as to justify an arrest for nonpayment without the return unsatisfied of an execution against defendant's property. *Elsner v. Shrigley*, 80 Iowa, 30.

<sup>70</sup> *Starr and Curtis' Ann. Ill. Stats.*, 2d ed., p. 1410, § 631.

<sup>71</sup> *Merchants' Bank v. Dwight, Jr.*, 13 How. Pr. 366.

on the other hand, the new obligation is taken as additional security, and without intending to release the old one, the right to arrest the defendant continues as before.<sup>72</sup> The recovery of a judgment on a demand does not preclude the plaintiff from prosecuting a subsequent action for deceit arising out of the same transaction.<sup>73</sup> The rules respecting executions against the person are the same in the national as in the state courts. "No person shall be imprisoned for debt in any state on process issuing from a court of the United States, where by the laws of such state imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state."<sup>74</sup> After execution from one of the national courts has issued against a defendant, and he has been arrested thereon, his right to a discharge, and the proceedings by which it may be made available are precisely the same as if the writ had issued out of one of the courts of the state, except that "such proceedings shall be had before any one of the commissioners of the circuit court for the district where the defendant is held."<sup>75</sup>

<sup>72</sup> *Snipman v. Shafer*, 14 Abb. Pr. 449; *Harding v. Shannon*, 20 How. Pr. 25; *Pettingill v. Mather*, 12 Abb. Pr. 436. *Contra*, *Alliance Ins. Co. v. Cleveland*, 14 How. Pr. 408.

<sup>73</sup> *Wanzer v. De Baum*, 1 E. D. Smith, 261; 1 Code R., N. S., 280; *Greenbaum v. Stein*, 2 Daly, 223.

<sup>74</sup> Rev. Stats. U. S., § 990; *Gray v. Munroe*, 1 McLean, 528; *Moan v. Wilmarth*, 3 Wood. & M. 309; *Low v. Durfee*, 5 Fed. Rep. 256; *Stroheim v. Deimel*, 73 Fed. Rep. 430.

<sup>75</sup> Rev. Stats. U. S., § 991.

§ 454 a. **How Right to Execution against the Person may be Lost.**—We have already stated that a plaintiff is deemed to have relinquished his right to execution against defendant's person when, with full knowledge of the facts, he receives a new obligation in satisfaction of an old liability upon which such execution might have issued.<sup>76</sup> A provision in a promissory note exempting the body of the maker from arrest in the enforcement of his liability thereon, was held effective in New Hampshire.<sup>77</sup> A proceeding for an execution against the body of a debtor is barred by a prior, though erroneous, judgment in his favor in a proceeding supplementary to execution, where there is, in the two proceedings, identity of cause of action, necessary evidence and of the end sought to be attained.<sup>78</sup> Perhaps the most common waiver or forfeiture of the right to body execution arises from plaintiff's misjoinder of causes of action.<sup>79</sup> If he unites several causes of action, some of which are, and others of which are not, grounds of arrest, he is deemed to have elected to resort for satisfaction only to the property of the defendant, and his right to execution against defendant's person is lost.<sup>80</sup> But where it is apparent that the cause of action found in favor of the plaintiff is one entitling him to such an execution, it is held in South Dakota that execution against the person may be issued regardless of such misjoinder.<sup>81</sup> The right

<sup>76</sup> See ante, § 454.

<sup>77</sup> *Chickering v. Greenleaf*, 6 N. H. 51.

<sup>78</sup> *Baker v. State*, 109 Ind. 47.

<sup>79</sup> See ante, §§ 452, 453.

<sup>80</sup> *Pam v. Vilmar*, 52 How. Pr. 238; *Smith v. Knapp*, 30 N. Y. 581; *Miller v. Scherder*, 2 N. Y. 262; *Brown v. Ashbough*, 40 How. Pr. 226, 243; *Williams etc. Fertilizer Co. v. Rudd*, 68 Vt. 607.

<sup>81</sup> *Hermann v. Sherin*, 8 S. D. 36, 59 Am. St. Rep. 744. Compare *Stewart v. Bryan*, 121 N. C. 46.

to body execution in a suit of replevin is waived by an election to take damages.<sup>82</sup> A judgment revived on scire facias does not, in Vermont, carry as an incident any right to a close jail execution which attached to the original judgment.<sup>83</sup> Under the New York code a defendant, unless charged in execution within the period allowed by statute, is entitled to a discharge upon proper application being made by him for a supersedeas of the writ, whether he has been taken in actual custody or not, unless reasonable cause be shown why the application should be denied.<sup>84</sup>

**§ 455. Form of Executions against the Person.**—The rules governing the form of writs of fieri facias are equally applicable to writs of capias ad satisfaciendum, except that the former writs must command a levy upon goods and chattels, and the latter the arrest and detention of the debtor.<sup>85</sup> The writ should issue,

<sup>82</sup> *Pomeroy v. Crocker*, 4 Chand. (Wis.) 174.

<sup>83</sup> *Slayton v. Smilie*, 66 Vt. 197.

<sup>84</sup> N. Y. Code Civ. Proc., § 572. See *Smith v. Knapp*, 30 N. Y. 581; *Merchants' Nat. Bank v. Mosher*, 54 How. Pr. 415; *Segelke v. Finan*, 22 Abb. N. C. 458.

<sup>85</sup> For form of capias ad satisfaciendum at common law, see *Bingham on Judgments and Executions*, 445, 446; *Finley v. Smith*, 4 Dev. 98; *Davis v. Richmond*, 14 Mass. 473. The capias ad satisfaciendum must be against all the defendants. *Howzer v. Dellinger*, 1 Ired. 475; *Clarke v. Clement*, 6 Term Rep. 525. Mr. Wait, in his *Practice*, volume 4, page 122, gives the following form for an execution against the person, in New York: "The People of the State of New York, to the Sheriff of the County of—, greeting: Whereas, judgment was rendered on the — day of —, one thousand eight hundred and —, in an action in the — court. In favor of —, against —, for the sum of — dollars and — cents, as appears to us by the judgment-roll, filed in the office of the clerk of the county of —. And whereas, the said judgment was docketed in your county on the — day of —, in the year one thousand eight hundred and —, and the sum of \$—, with interest from the day of —, 187—, is now actually due thereon. And whereas, an execution against the property of the judgment debtor has been duly issued to the sheriff of the

like other process in the name of the state,<sup>86</sup> and should be directed to the sheriff of the county wherein action was brought.<sup>87</sup> The writ should direct satisfaction to be made to the plaintiff and not to the commonwealth, otherwise it is insufficient.<sup>88</sup> A writ commanding the sheriff to take the body of the defendant "and him safely keep until discharged as the law directs," although informal, is yet a valid *ca. sa.*<sup>89</sup> In New York, it "must substantially require the sheriff to arrest the judgment debtor, and commit him to the jail of the county until he pays the judgment or is discharged according to law. Except where it may be issued without the previous issuing and return of an execution against property, it must recite the issuing and return of such an execution, specifying the county to which it was issued."<sup>90</sup> It need not describe the execution which has issued against the debtor's property, and a mistake in such description will not invalidate the execution against the person.<sup>91</sup> It is not nec-

proper county, and returned unsatisfied: Therefore, we command you, that you arrest the said judgment debtor, and commit — to jail of your county until — shall pay the said judgment, or be discharged according to law, and that you return this execution as required by law.

"Attorney for —.

"Dated the — day of, 187—."

This form recites the facts authorizing the issuing of the writ. This recital, though proper, is not essential. *Hutchinson v. Brand*, 9 N. Y. 208, 6 How. Pr. 73; *Fullerton v. Fitzgerald*, 18 Barb. 441, 10 How. Pr. 37.

<sup>86</sup> *Webster v. Farley*, 6 Blackf. (Ind.) 163.

<sup>87</sup> *Cochran v. Drake*, 18 N. J. L. 9; *Walker v. Vick*, 2 Dev. & B. 99.

<sup>88</sup> *Abbott v. Daniel*, 3 Met. (Ky.) 339.

<sup>89</sup> *State v. Reeves*, 4 Dev. & B. 187.

<sup>90</sup> N. Y. Code Civ. Proc., § 1372; N. C. Code, § 448, subd. 3; *O'Shea v. Kohn*, 38 Hun, 149; *People v. Reilly*, 58 How. Pr. 218.

<sup>91</sup> *Steamship R. H. Co. v. Seager*, 31 App. Div. (N. Y.) 288.

essary to state the nature of the action,<sup>92</sup> nor to recite the facts which authorize the arrest.<sup>93</sup> The recovery of judgment, and the amount of the same are, of course, proper and necessary recitals.<sup>94</sup> In Iowa, the order of arrest may be issued by a referee properly appointed in proceedings auxiliary to execution.<sup>95</sup> A writ, in order to be valid, must follow the judgment upon which it is issued and be as broad as it is. Therefore, if based upon a joint judgment, personal executions cannot issue against the defendants separately.<sup>96</sup> Separate execution against the person of one joint judgment debtor cannot be issued even after the other has been discharged.<sup>97</sup>

**§ 456. Consequences of Irregularities.**—In preceding portions of this work we have shown that irregularities in the issuing and form of executions are, in most courts, treated as rendering writs voidable, but not void. This rule is not more applicable to executions against property than it is to executions against the person.<sup>98</sup> But here, as elsewhere, the distinction be-

<sup>92</sup> *Fruitport Tp. v. Dickerman*, 90 Mich. 20; *Fullerton v. Fitzgerald*, 10 How. Pr. 37, 18 Barb. 441.

<sup>93</sup> *Hutchinson v. Brand*, 9 N. Y. 208; *Kinney v. Laughenour*, 97 N. C. 325; *Matter of Remsen*, 2 Law Bull. 55.

<sup>94</sup> *Ex parte Peacock*, 25 Fla. 478; *O'Shea v. Kohn*, 38 Hun, 149.

<sup>95</sup> *Marriage v. Woodruff*, 77 Ia. 291.

<sup>96</sup> *Judson v. McLelland*, Busb. (N. C.) 262; *Fromberger v. Karsner*, 1 Houst. (Del.) 290; *Howzer v. Dellinger*, 1 Ired. 475; *Casson v. Cureton*, 12 Mart. (La.) 435. See *Davis v. Robinson*, 10 Cal. 411.

<sup>97</sup> *Farmers' etc. Nat. Bank*, 15 Abb. Pr., N. S., 434.

<sup>98</sup> *Crocker on Sheriffs*, § 563; *Attorney-General v. Baker*, 9 Rich. Eq. 521; *Spence v. Stuart*, Bert. (N. B.) 219; *Pitcher v. Roberts*, 2 Dowl., N. S., 394; 7 Jur. 466; 12 L. J. Q. B. 178; *Rose v. Tomblinson*, 3 Dowl. P. C. 49; *Reuben v. Porterfield*, 19 Ga. 139; *Renick v. Orser*, 4 Bosw. 384; *Hinman v. Brees*, 13 Johns. 529; *Scott v. Shaw*, 13 Johns. 378; *Ontario Bank v. Hallett*, 8 Cow. 192; *Blanchenay v. Burt*, 3 Gale & D. 613; 4 Q. B. 707; 7 Jur. 575; 12 L. J. Q. B. 291; *Sutton v. Cardross*, 1 Dowl. P. C. 511; *Strong v. Dickenson*, 5 Dowl.

tween a want of power and an informality in the exercise of a conceded authority must not be forgotten. If the statute declares that the writ cannot issue except in certain contingencies, there is no power to issue it in their absence, and if so issued, it is void. Thus the code of New York declares that unless the judgment debtor is actually confined, an execution cannot issue against his person until an execution against his property has been returned wholly or partly unsatisfied. A writ issued in defiance of this inhibition is invalid, and will not protect the plaintiff and his attorneys from an action for false imprisonment.<sup>99</sup>

§ 456 a. **Actions for False Imprisonment.**—Process regular on its face protects the officer executing it, and this rule is as applicable to executions against the person of the defendant as to those against his property. Where a defendant who was discharged from arrest because of his infancy prosecuted an action against the plaintiff for false imprisonment, the court said: “It is entirely clear that such an action cannot be sustained against the officer making the arrest. An officer is protected in the service of process, if it is issued by a court having jurisdiction, and appears to be regular and valid, even if fraudulently or irregularly issued.”<sup>99a</sup> A more doubtful question is, whether the judgment creditor is answerable, if the defendant succeeds in obtaining his discharge on the ground that he was not liable to arrest. Undoubtedly, if the writ is issued upon a judgment not warranting its issuance, so that the defendant’s discharge ought to be directed by

P. C. 99; *Hutchinson v. Brand*, 9 N. Y. 208; *Scribner v. Whitcher*, 9 N. H. 63, 23 Am. Dec. 708; *State v. Reeves*, 4 Dev. & B. 187. Contra, *Walker v. Vick*, 2 Dev. & B. 99.

<sup>99</sup> *Bergman v. Noble*, 19 Abb. N. C. 62.

<sup>99a</sup> *Cassler v. Fales*, 139 Mass. 461.



any court before which he may be brought on habeas corpus, from a mere inspection of the record, and without considering any extrinsic evidence, the plaintiff and his attorneys, if they participated in issuing the writ, are answerable as for a false imprisonment.<sup>100</sup> "Where an arrest is made upon a legal process, regular on its face, and therefore sufficient to justify an officer, but which has been fraudulently or illegally obtained and issued, the party who procures it, and directs or causes it to be served, is not justified by it. He is bound to see to it, before he sets the law in motion, that the process he obtains is regular and valid; and if it is not, he is liable to an action of tort in the nature of trespass."<sup>101</sup> In some of the states, an officer is bound to take notice of facts coming to his knowledge, though not disclosed by the writ or any proceeding in the action anterior thereto. Hence it was held that an officer was answerable in an action for assault and false imprisonment in serving a writ purporting to authorize the arrest of the defendant in the action, he being the master of a vessel of which the plaintiff was or had been a seaman, and the officer being informed that the claim of the plaintiff in the writ would be adjusted at the consulate of the kingdom to which the vessel belonged, that consulate having, by virtue of a treaty, exclusive jurisdiction of such claims.<sup>102</sup> Generally if the right of the defendant to his discharge depends on some extrinsic matter which he must establish to the satisfaction of the court, the plaintiff is not guilty of a false imprisonment. Hence if the defendant

<sup>100</sup> *Bergman v. Noble*, 19 Abb. N. C. 62.

<sup>101</sup> *Cassier v. Fales*, 139 Mass. 462; *Emery v. Hapgood*, 7 Gray, 55, 66 Am. Dec. 459; *Bates v. Pilling*, 6 Barn. & C. 38; *Codrington v. Lloyd*, 8 Ad. & E. 449.

<sup>102</sup> *Tellefsen v. Fee*, 168 Mass. 188, 60 Am. St. Rep. 379.

is released on account of his infancy, or because she was a married woman, or of some other ground of privilege from arrest, not appearing on the face of the writ or judgment, he can maintain no action for false imprisonment.<sup>103</sup> In that class of cases, the process is regularly issued and the protection of the plaintiff is assured by the general rule expressed by Lord Kenyon, that "it is incomprehensible to say that a person shall be considered a trespasser who acts under the process of the court."<sup>104</sup>

In the case of *Marks v. Townsend*, 97 N. Y. 590, it appeared that the plaintiff, Marks, had been arrested, but had procured his discharge from the arrest, on the ground that he was not liable thereto because of his having been arrested previously in an action brought against him by the same parties, and on substantially the same grounds. The present action was for false imprisonment, and also for malicious prosecution. A nonsuit was granted in the trial court, which the court of appeals affirmed upon the following grounds: "The facts stated in the affidavit on which the warrant was issued were sufficient to give the judge who issued it jurisdiction; and in issuing it he acted judicially, and made a judicial determination. The warrant was not, therefore, void or voidable, or irregular. It was the result of the regular judicial action of a judicial officer having jurisdiction, on the facts presented to him, to issue it. It was subsequently set aside by the judge who issued it, when a new fact—to wit, that the plaintiff had before been arrested in an action against him by these defendants, upon an order of arrest issued in

<sup>103</sup> *Cassier v. Fales*, 139 Mass. 461; *Rich v. McInerney*, 103 Ala. 845, 49 Am. St. Rep. 32; *Winchester v. Everett*, 80 Me. 535, 6 Am. St. Rep. 228.

<sup>104</sup> *Belt v. Broadbent*, 3 Term Rep. 183.

the action, for the same cause, and upon substantially the same grounds—was brought to his attention. The existence of this fact did not make the warrant void or irregular. When brought to his attention, it furnished the judge a ground for the dismissal of the warrant in the exercise of further judicial action. It matters not whether the warrant was dismissed in the exercise of judicial discretion, or upon the claim by the plaintiff that he could not be twice arrested for the same cause, and hence that he had an absolute legal right to be discharged from the second arrest; it was, at most, a case where the plaintiff was erroneously arrested. An error was committed, which, upon a proper presentation of facts, was to be corrected by further judicial action. A warrant granted under such circumstances protects against an action for false imprisonment, not only the judge who granted it, but the party who procured it and instigated its service. The case stands no different from what it would have been if the plaintiff had appeared and denied the facts alleged in the affidavit upon which the warrant was based, and had thus procured his discharge on the merits; or if the defendants, when they applied for the warrant, had disclosed the fact of the prior arrest, and the judge had erroneously decided that they were entitled to it, and his decision had upon appeal been reversed; or if, when the fact of the prior arrest was afterward brought to his attention, he had refused to set aside the warrant, and his decision had, upon appeal, been reversed. If a warrant of attachment or an order of arrest is issued in an action upon facts giving the judge jurisdiction, and the defendant appears, and by showing new facts, or denying those alleged against him, procures the attachment or the order to be set

aside, the process is not void or voidable, or irregular, but simply erroneous, and protects the judge and the party who procures it, although it is set aside, against an action for trespass or false imprisonment. In all such cases, these are regular judicial methods, and that which was legally done at the time cannot be converted into a wrong by relation, after the process has, by judicial action, been set aside. This rule of exemption is founded on public policy, and is applicable alike to civil and criminal remedies and proceedings, that parties may be induced freely to resort to the courts and judicial officers for the enforcement of their rights and the remedy of their grievances, without the risk of undue punishment for their own ignorance of the law, or for the errors of courts and judicial officers. The remedy of the party unjustly arrested or imprisoned is by the recovery of costs which may be awarded to him, or the redress which some statute may give him, or by an action for malicious prosecution, in case the prosecution against him has been from unworthy motives, and in the absence of probable cause. Even malicious motives and the absence of probable cause do not give a party arrested an action for false imprisonment. They may aggravate his damage, but have nothing whatever to do with the cause of action. Hence, if, in this case, the defendant had intentionally withheld from the judge who granted the warrant the fact of the plaintiff's prior arrest, that fact would have been quite pertinent to maintain an action for malicious prosecution, but would not have laid the foundation for a recovery for false imprisonment."

**§ 456 b. Malicious Prosecution and Abuse of Process.** Where an arrest under execution is unjustifiable, but the action of false imprisonment cannot be sustained

because the process was regular on its face, and not subject to be released except on proof of extrinsic facts, the remedy of the plaintiff, if any he has, must be either by an action for malicious prosecution or for the abuse of legal process. Actions for the malicious prosecution of civil suits are rare, but there is no doubt that they are sustainable, especially when accompanied by a wrongful arrest of the defendant. It is necessary, however, for him to prove, as in a suit for the malicious prosecution of a criminal action, that his arrest was induced by malice and was without proper cause.<sup>105</sup>

An action for the abuse of legal process differs very essentially from an action for malicious prosecution. Legal process is abused, so that an action may be sustained by the defendant, when it is employed by the plaintiff for the purpose of accomplishing some collateral object for which he has no right to use his process. An action may, therefore, be sustained whether there was a proper cause for the arrest or not, and whether the plaintiff was actuated by malice or not, and also before the determination of the cause in which the arrest was procured and before the arrest was adjudged to be unlawful.<sup>106</sup> Instances of the abuse of legal process arise when the object of the arrest is to extort money from the defendant, or to coerce him into surrendering possession of property,<sup>107</sup> or to compel him to pay a debt out of property exempt from execution.<sup>108</sup>

<sup>105</sup> *Emery v. Glnman*, 24 Ill. App. 65; *Besson v. Southard*, 10 N. Y. 236; *Herman v. Bookerhoff*, 8 Watts, 240; *Lauzon v. Charroux*, 18 R. I. 467.

<sup>106</sup> *Page v. Cushing*, 38 Me. 523; *Johnson v. Reed*, 136 Mass. 421; *Wood v. Graves*, 144 Mass. 365, 59 Am. Rep. 95; *Mayer v. Walter*, 64 Pa. St. 283; *Grainger v. Hill*, 4 Bing. N. C. 212.

<sup>107</sup> *Grainger v. Hill*, 4 Bing. N. C. 212.

<sup>108</sup> *Lockhart v. Bear*, 117 N. C. 298.

§ 457. Alias Writs of Capias ad Satisfaciendum may be issued. Their issue is authorized—1. Where the original was returned unexecuted,<sup>109</sup> or was not returned at all.<sup>110</sup> 2. Where, though it was executed, the defendant escaped,<sup>111</sup> or was rescued,<sup>112</sup> or illegally discharged,<sup>113</sup> or was discharged because of some irregularity,<sup>114</sup> or of his being temporarily privileged from arrest.<sup>115</sup> When the sheriff intentionally permits a defendant to escape, he has no right to pursue and retake him without a new authority from the plaintiff. The plaintiff may elect to treat the defendant as out of custody, and may recover from the sheriff the full amount due from the defendant; or he may procure the issuance of an alias writ, and thereby authorize the recapture of the defendant,<sup>116</sup> or he may, of course, bring an action of debt on his judgment.<sup>117</sup> While a defendant is in custody under one writ

<sup>109</sup> *People v. Kehl*, 15 Mich. 330. See *Peyton v. Brooke*, 3 Cranch, 93.

<sup>110</sup> *Fulton v. Wood*, 3 Har. & M. 99. Compare *Windrum v. Parker*, 2 Leigh. 361.

<sup>111</sup> *Mumford v. Armstrong*, 4 Cow. 553; *Fawkes v. Davison*, 8 Leigh, 554; *Sharp v. Caswell*, 6 Cow. 65; *Eads v. Wynne*, 79 Hun, 463.

<sup>112</sup> See *David v. Blundell*, 39 N. J. L. 614.

<sup>113</sup> *Freeman v. Smith*, 7 Ind. 582. holding that an illegal discharge amounts to an escape.

<sup>114</sup> *Collins v. Beaumont*, 2 Perry & D. 363; 10 Ad. & El. 225; *Merchant v. Frankis*, 2 Gale & D. 473; 3 Q. B. 1; *Glinochio v. Figari*, 4 E. D. Smith, 227; *Woods v. Brzezinski*, 57 Conn. 471; *Kinney v. Laughenour*, 97 N. C. 326.

<sup>115</sup> *Phillips v. Price*, 1 Dowl. & L. 110; 7 Jur. 672; 12 L. J. Q. B. 348. See §§ 459, 467; *Humphrey v. Cumming*, 5 Wend. 90.

<sup>116</sup> *Cheever v. Mirrick*, 2 N. H. 376; *Thompson v. Lockwood*, 15 Johns. 256; *Littlefield v. Brown*, 1 Wend. 398; *Bloomfield v. Roswick*, Cro. Eliz. 555. See § 461; *Windrum v. Parker*, 2 Leigh, 361; *Long v. Cherrington*, 161 Pa. St. 248.

<sup>117</sup> *Appleby v. Clark*, 10 Mass. 59; *Cheever v. Mirrick*, 2 N. H. 376; *Jackson v. Hampton*, 6 Ired. 36.

of execution another cannot issue upon the same judgment.<sup>118</sup> No alias execution will be issued where the defendant, being taken in custody under one writ, has been released with plaintiff's consent,<sup>119</sup> or has been discharged by due course of law.<sup>120</sup> Where defendant is released from custody upon giving bond that he will take the benefit of the insolvency laws and, if refused discharge, will surrender himself into custody, and, upon being refused a discharge, does not so surrender himself, an alias *capias* is not properly issuable, the remedy of plaintiff being upon the bond.<sup>121</sup> It is not essential to the validity of an alias writ that it should notice the first writ or state that it is an alias writ.<sup>122</sup>

§ 458. *Amending and Quashing.*—A *capias ad satisfaciendum* is subject to amendment to the same extent as other writs of execution.<sup>123</sup> It may also be quashed where improperly issued,<sup>124</sup> and if issued where there was no authority to support it, the court cannot require, as a condition precedent to such quashing, that the defendant shall stipulate not to bring an action for

<sup>118</sup> *Noe v. Christie*, 46 How. Pr. 496.

<sup>119</sup> *Bryan v. Simonton*, 1 Hawks, 51; *Little v. Newburyport Bank*, 14 Mass. 443; *Windrum v. Parker*, 2 Leigh, 361.

<sup>120</sup> *Masters v. Edwards*, 1 Caines, 516; *Matter of Nebenzahl*, 57 How. Pr. 328. See *Ex parte Bachelder*, 96 Cal. 233.

<sup>121</sup> *David v. Blundell*, 39 N. J. L. 612. See *Coburn v. Palmer*, 10 Cush. 273. Compare *Lord v. Locke*, 62 N. H. 566, sustaining an alias *capias* issued under similar circumstances, but only in so far as it ran against defendant's estate and not against his person.

<sup>122</sup> *Woods v. Brzezinski*, 57 Conn. 471.

<sup>123</sup> *McCormack v. Melton*, 1 Ad. & E. 331; 3 Nev. & M. 881; *Arnall v. Weatherby*, 5 Tyrw. 485; *In re Cobbett*, 10 Week. Rep. 40; 5 L. T. N. S., 285; *Benedict Mfg. Co. v. Thayer*, 21 Hun. 614; *People v. Seaton*, 25 Hun. 305; *Newnham v. Law*, 5 D. & E. 577.

<sup>124</sup> *Humphrey v. Brown*, 17 How. Pr. 481; *Pinckney v. Hegeman*, 53 N. Y. 31; *Huntington v. Metzger*, 158 Ill. 272; *Gove v. Stewart*, 17 N. Y. Supp. 183.

damages for his unlawful arrest under the writ.<sup>125</sup> "Such a condition," it has been said, "may well be imposed where the court is satisfied the arrest is without justice but upon probable cause, such as conflicting affidavits in regard to the right to arrest, and upon which a judge has exercised judicial discretion and granted an order of arrest, or some informality or defect in stating a case where the right to arrest exists."<sup>126</sup> An execution against the person will not be vacated merely because of an irregularity in the entry of the judgment.<sup>127</sup> An irregularity in an order to show cause why a body execution should not be vacated may be waived by the person against whom the order runs.<sup>128</sup> In seeking to have an unauthorized writ vacated the defendant does not appeal to the discretion of the court. He demands a right, which must be unconditionally conceded.

**§ 458 a. Some Limitations as to Persons against whom the Writ may Run.**—An examination of the statutes of the various states reveals a tendency on the part of legislators to temper, on behalf of women, the severity of the writ of *capias ad satisfaciendum*. In some states the persons of women are exempt from arrest in actions for debt.<sup>129</sup> In Oregon and Wisconsin it is provided that no female shall be arrested in any action, except for an injury to person, character, or

<sup>125</sup> *Chapin v. Foster*, 101 N. Y. 1; *Mayer v. Rothschild*, 59 How. Pr. 510.

<sup>126</sup> *Potter, J.*, in *Mayer v. Rothschild*, 59 How. Pr. 510. See *Bank of U. S. v. Jenkins*, 18 Johns. 305; *Walker v. Isaacs*, 36 Hun, 233.

<sup>127</sup> *Crosby v. Root*, 43 N. Y. Supp. 512.

<sup>128</sup> *Gove v. Stewart*, 17 N. Y. Supp. 183.

<sup>129</sup> *Blight v. Meeker*, 7 N. J. L. 97; *Desprang v. Davis*, 3 McC. 16; S. C. Code Civ. Proc., § 200; Rev. Laws of Vt., 1880, § 1476; Burns' Ann. Ind. Stats., 1894, § 817; Glauque's Rev. Oh. Stats., 7th ed., § 5437.



property,<sup>130</sup> and in the latter state no execution may issue against the person of a female upon any justice's judgment in any civil action.<sup>131</sup> The New York Code of Civil Procedure provides that "an execution cannot be issued against the person of a woman, unless an order of arrest has been granted and executed in the action, and, if it was executed against the judgment debtor, has not been vacated."<sup>132</sup>

Where an infant being, through his guardian, plaintiff in an action, the nature of which would entitle him to the arrest of the defendant, is unsuccessful and has costs adjudged against him, his guardian is made personally liable in New York by a statute which expressly authorizes his arrest as a means of enforcing this liability.<sup>133</sup> But in the absence of statutory authority, though the guardian's liability in such a case be recognized by statute, execution against his person cannot issue.<sup>134</sup> This particular machinery for enforcing the liability must be furnished by statute or it is not available.

Execution may issue against the person of the president of a corporation in an action for damages brought by a person who has extended credit to the corporation in reliance upon the false and fraudulent representations of the defendant regarding its solvency.<sup>135</sup> Where one defendant on a joint obligation is exempt from arrest, his exemption extends to his codefendant,<sup>136</sup> but the contrary is true where the obligation

<sup>130</sup> Hill's Ann. Or. Stats., 2d ed., § 108; Sanborn & Berryman Ann. Stats. Wis., § 2689.

<sup>131</sup> Sanborn & Berryman Ann. Stats. Wis., § 3681.

<sup>132</sup> § 1488.

<sup>133</sup> Grantman v. Thrall, 31 How. Pr. 464; Linner v. Crouse, 61 Barb. 289; Miller v. Woodhead, 52 Hun. 127.

<sup>134</sup> Granholme v. Sweigle, 3 N. D. 476.

<sup>135</sup> Phillips v. Wortendyke, 31 Hun, 192.

<sup>136</sup> Faulkner v. Whitaker, 15 N. J. L. 438.

is joint and several.<sup>137</sup> A partnership or firm cannot be arrested, though its individual members may be.<sup>138</sup> Where moneys have been misappropriated to the use of a firm by one partner, a person injured thereby may have such partner arrested in an action against the partnership to recover the funds misappropriated.<sup>139</sup> Where one partner, without the knowledge or consent of his copartners, fraudulently contracts a firm debt, although his copartners may be bound with him to pay the debt, only he may be arrested in an action for the recovery thereof.<sup>140</sup> This conclusion is based upon the substantial ground that a defendant may not be arrested in an action of debt except he be shown to have been guilty of fraud in contracting, or in avoiding payment of, the debt.<sup>140a</sup> The mere fact that a person found within the jurisdiction of a court is a non-resident, gives him no immunity from arrest in a civil action brought against him.<sup>141</sup>

**§ 459. Who are Privileged from Arrest.**—Except where otherwise ordered by statute, exemptions from arrest under executions are confined to those cases where the person sought to be arrested is under obligation to perform some duty of a public nature, or to attend before some tribunal competent to require

<sup>137</sup> *Gibbes v. Mitchell*, 2 Bay, 406.

<sup>138</sup> *Faulkner v. Whitaker*, 15 N. J. L. 438.

<sup>139</sup> *Bank v. Jennings*, 38 S. C. 372.

<sup>140</sup> *Nat. Bank of Commonwealth v. Temple*, 39 How. Pr. 432; *McNeely v. Haynes*, 76 N. C. 122. See contra, *Sherman v. Smith*, 42 How. Pr. 198; *Coman v. Allen*, 21 How. Pr. 114.

<sup>140a</sup> See ante, § 452.

<sup>141</sup> *Powers v. Davenport*, 101 N. C. 286; *Bank of Vergennes v. Barker*, 27 Vt. 243; *Bank of Rutland v. Barker*, 27 Vt. 293; even though for the charge against him he could not be arrested in the place of his residence. *Johnson v. Whitman*, 10 Ab. Pr., N. S., 111.

and enforce his attendance. Thus soldiers,<sup>142</sup> mariners,<sup>143</sup> and policemen<sup>144</sup> are necessarily exempt from arrest, at least while in the performance of their duties. So in England, a lord of the bed-chamber,<sup>145</sup> or a page,<sup>146</sup> chaplain,<sup>147</sup> or servant<sup>148</sup> of a king or queen, being under obligation to attend the sovereign whenever commanded, cannot be seized and held under execution. Members of Parliament,<sup>149</sup> of Congress, and of the various state legislatures,<sup>150</sup> are also privileged from arrest during the sessions of the several legislative bodies to which they belong, and also for a reasonable time before and after such sessions. Ambassadors, public ministers, consuls, and vice-consuls of foreign nations, residing in or passing through the United States, and their domestic servants, are ex-

<sup>142</sup> *People v. Campbell*, 40 N. Y. 133; *Crocker on Sheriffs*, § 294; § 1237, *Rev. Stats. of U. S.*

<sup>143</sup> *Rev. Stats. of U. S.*, § 1610.

<sup>144</sup> *Squire's Case*, 12 Abb. Pr. 38; *Hart v. Kennedy*, 24 How. Pr. 425; 39 Barb. 186; 15 Abb. Pr. 290; 1 *Walt's Pr.* 596.

<sup>145</sup> *Aldridge v. Barry*, 3 Dowl. P. C. 450, note.

<sup>146</sup> *Reynolds v. Pocock*, 7 Dowl. P. C. 4; 4 Mees. & W. 371; 2 Jur. 924.

<sup>147</sup> *Winter v. Dibdin*, 2 Dowl. & L. 211; 13 Mees. & W. 25; 13 L. J. Ex. 263; *Byrn v. Dibdin*, 1 Crompt. M. & R. 821; 3 Dowl. P. C. 448; 1 Gale. 58; 5 Tyrw. 357; *Swan v. Dakins*, 16 Com. B. 77; 3 Car. Law Rep. 602; 1 Jur., N. S., 378; 24 L. J. Com. P. 131; *Harvey v. Dakins*, 3 Ex. 266; 6 Dowl. & L. 437; 18 L. J. Ex. 156.

<sup>148</sup> *Bartlett v. Hebbes*, 5 Term Rep. 686; *King v. Foster*, 2 Taunt. 167; *Dyer v. Disney*, 16 Mees. & W. 312; 4 Dowl. & L. 698; 16 L. J. Ex. 183; *Tapley v. Battine*, 1 Dowl. & R. 79; *Hatton v. Hopkins*, 6 Maule & S. 271.

<sup>149</sup> *Cassidy v. Stewart*, 2 Scott N. R. 432; 2 Man. & G. 437; 9 Dowl. P. C. 366; 5 Jur. 25; *Goudy v. Duncombe*, 5 Dowl. & L. 209; 1 Ex. 430; 17 L. J. Ex. 76. Peers and peeresses are at all times privileged from arrest. *Digby v. Stirling*, 8 Bing. 55; 1 Maule & S. 116; 1 Dowl. P. C. 248; 1 Broom and Hadley's Com. 198; *Coates v. Ha-warden*, 7 Barn. & C. 388; 1 Man. & R. 110.

<sup>150</sup> *Colvin v. Morgan*, 1 Johns. Cas. 415; *Lewis v. Elmendorf*, 2 Johns. Cas. 222; *In the Matter of Hon. Platt Potter*, 55 Barb. 625; U. S. Const., art. 1, § 6; *Crocker on Sheriffs*, §§ 295, 296.

empt from arrest on civil process.<sup>151</sup> A duly accredited secretary of legation, acting as chargé d'affaires in the absence of his ambassador, is entitled to the privileges of the latter.<sup>152</sup> It is obvious that the administration of justice could be very seriously obstructed if the attendance of either the suitors, or witnesses, or counsel, or of any other person whose presence was requisite to the progress of the suit could be prevented by an arrest under civil process. The law has avoided the possibility of such obstructions by exempting all such persons from arrest under execution during the time when they are going to and from court, as well as during the time when they are in actual attendance in obedience to its process.<sup>153</sup> The courts consid-

<sup>151</sup> Crocker on Sheriffs, §§ 292, 293; Rev. Stats. of U. S., § 4063; 1 Wait's Pr. 593; D'Azambujga v. Pereira, 1 Miles, 366; Dupont v. Pichon, 4 Dall. 821; Holbrook v. Henderson, 4 Sand. 619; Valarino v. Thompson, 7 N. Y. 576; United States v. Ravara, 2 Dall. 299; Commonwealth v. Kosloff, 5 Serg. & R. 545; Mannhardt v. Soderstrom, 1 Binn. 138; Flynn v. Stoughton, 5 Barb. 115; Priquet v. Bath, 8 Burr. 1478; Viveash v. Beeker, 3 Maule & S. 284; Fisher v. Begrez, 2 Dowl. P. C. 279; Davis v. Packard, 7 Pet. 276.

<sup>152</sup> Ex parte Cabrera, 1 Wash. C. C. 232; United States v. Benner, Bald. 234; Taylor v. Best, 14 Com. B. 487; 25 El. & El. 383.

<sup>153</sup> Regarding the privilege of the parties litigant from arrest, see Walpole v. Alexander, 3 Doug. 45; Rex v. Delaval, 1 W. Black. 410; 3 Burr. 1434; Lightfoot v. Cameron, 2 W. Black. 1113; Childerston v. Barrett, 11 East, 439; Ex parte Cobbett, 7 El. & B. 955; 3 Jur. 665; 26 L. J. Q. B. 293; Persse v. Persse, 5 H. L. Cas. 671; Hopkins v. Coburn, 1 Wend. 292; Hatch v. Blisset, 2 Strange, 986; Montague v. Harrison, 3 Com. B., N. S., 292; 4 Jur. N. S., 29; 27 L. J. Com. P. 24; Salhinger v. Adler, 2 Rob. 704; Meekins v. Smith, 1 H. Black. 636; Pitt v. Coombs, 3 Nev. & M. 212; 5 Barn. & Adol. 1078; Clark v. Grant, 2 Wend. 257; Rimmer v. Green, 1 Maule & S. 638; Merrill v. George, 23 How. Pr. 331; List's Case, 2 Ves. & B. 373; Willingham v. Matthews, 6 Taunt. 356; Lucas v. Albee, 1 Denio, 666; Parker v. Hotchkiss, 1 Wall. C. C. 269; 1 Wait's Pr. 597-599. As to the exemption of witnesses, see Hurst's Case, 4 Dall. 387; 1 Wash. C. C. 186; Rishton v. Nisbett, 1 Moody & R. 347; Webb v. Taylor, 1 Dowl. & L. 676; 8 Jur. 39; 13 L. J. Q. B. 24; Cole v. McClellan, 4 Hill, 59; Arding v. Flower, 8 Term Rep. 534; Hardenbrook's Case,

ering the question have generally declared that the rules exempting suitors from arrest under civil process while going to, and coming from, court, and while in actual attendance thereon, do not apply to criminal prosecutions. We have not found any case where sustaining the arrest in question would have prevented a person accused of crime from proceeding to court in response to an order to do so, or for the purpose of there submitting to a trial of the charge pending against him. The arrests actually made and sustained have generally been effected in court, or while returning therefrom, but after the discharge of the accused from further necessity of attendance, at least at that time, but the language of the judges has been sufficiently comprehensive to deny wholly the right of persons attending court in response to a criminal charge to exemption from arrest under civil process.<sup>154</sup> The person may be brought into one state as a fugitive from justice on a requisition, and afterward discharged from arrest, and the question may then arise whether he is entitled to a reasonable time within

8 Abb. Pr. 416; *Norris v. Beach*, 2 Johns. 294; *Sanford v. Chase*, 3 Cow. 381; *Seaver v. Robinson*, 3 Duer, 622. The circumstances in which lawyers are not subject to arrest on civil process are determined in *Attorney-General v. Leathersellers' Co.*, 7 Beav. 157; *Williams v. Webb*, 5 Scott N. R. 898; 12 L. J. Com. P. 89; *Newton v. Constable*, 1 Gale & D. 408; 2 Q. B. 157; 9 Dowl. P. C. 933; 6 Jur. 317; *In re Hope*, 9 Jur. 846; *Newton v. Harland*, 8 Scott, 70; *Corey v. Russell*, 4 Wend. 204; *Secor v. Bell*, 18 Johns. 52; *Humphrey v. Cumming*, 5 Wend. 90; *Jones v. Marshall*, 3 Jur., N. S., 916; 26 L. J. Com. P. 229; 2 Com. B., N. S., 615; 40 El. & El. 321; *In re Jewett*, 10 Jur., N. S., 814; 33 L. J. 730; 12 West. Rep. 945; 33 Beav. 559. The exemption of lawyers is denied in Georgia. *Elam v. Lewis*, 19 Ga. 608.

<sup>154</sup> *Williams v. Bacon*, 10 Wend. 636; *Moore v. Green*, 73 N. C. 394, 31 Am. Rep. 470; *Wood v. Boyle*, 177 Pa. St. 620, 55 Am. St. Rep. 747; *Scott v. Curtis*, 27 Vt. 762; *Goodwin v. London*, 1 Ad. & El. 378; *Hare v. Hyde*, 16 Q. B. 394.

which to return to the state whence he was taken, and to be exempt, in the interval, from arrest under civil process. This question has been but little considered. The courts of Wisconsin maintain that, upon grounds of public policy and to prevent any perversion of extradition proceedings, the right to immunity from arrest should be affirmed,<sup>155</sup> but in New York, it has been held that the privilege from arrest does not exist unless the criminal prosecution is shown to be a mere pretext for bringing the defendant within the state for the purpose of proceeding against him in a civil action.<sup>156</sup>

In most cases the privilege of exemption from arrest is but temporary in its duration, and a defendant who has been discharged from arrest on account of his privilege may be rearrested as soon as his privilege terminates by lapse of time, or by any other cause.<sup>157</sup> The right to claim exemption may be waived, and is waived, by giving bail.<sup>158</sup> It has been held that no action could be sustained for taking a privileged person in execution, when the plaintiff did not know of his being privileged.<sup>159</sup> But a privileged person who pays money to procure his discharge is entitled to have it returned.<sup>160</sup>

All the exemptions from arrest of which we have treated thus far were evidently not grounded on any

<sup>155</sup> *Moletor v. Sinnen*, 76 Wis. 308, 70 Am. St. Rep. 21.

<sup>156</sup> *Williams v. Bacon*, 10 Wend. 636.

<sup>157</sup> *Van Wezel v. Van Wezel*, 1 Edw. Ch. 113; *Reynolds v. Newton*, 1 Gale & D. 153; 1 Q. B. 525; 5 Jur. 958.

<sup>158</sup> *Petrie v. Fitzgerald*, 1 Daly. 401; *Stewart v. Howard*, 15 Barb. 26.

<sup>159</sup> *Stokes v. White*, 1 Crompt. M. & R. 223; 4 Tyrw. 786.

<sup>160</sup> *Pitt v. Coombs*, 4 Nev. & M. 535; 2 Ad. & E. 459; *Williams v. Webb*, 5 Scott N. R. 898; 9 Jur. 846; 2 Dowl., N. S., 904; 12 L. J. Com. P. 89.

special regard or commiseration for the debtor, but were attributable solely to the necessity of preventing the obstruction of the administration of justice and of the performance of official duties devolving on the defendant. Where these grounds did not exist, every person against whom was rendered a valid judgment for a specific amount of money was liable to be taken and held under execution until the judgment was satisfied.<sup>161</sup> Thus lunatics,<sup>162</sup> infants,<sup>163</sup> and married women<sup>164</sup> were all liable to be taken in execution, though in England it was ruled that a married woman could not be taken in execution for costs.<sup>165</sup> In some of the states, the statutes authorizing execution to issue

<sup>161</sup> Crocker on Sheriffs, § 290.

<sup>162</sup> Steel v. Alan, 2 Bos. & P. 362; Ex parte Leighton, 14 Mass. 207; Nutt v. Verney, 4 Term Rep. 121; Ibbotson v. Galway, 6 Term Rep. 133; Kernot v. Norman, 2 Term Rep. 390. In New York, a lunatic will not be released from arrest, but will be sent to an asylum for the insane. Bush v. Pettibone, 5 Barb. 273; 1 Code R., N. S., 264.

<sup>163</sup> Lane v. Gover, 1 Har. & McH. 459.

<sup>164</sup> Hall v. White, 27 Conn. 488; Commonwealth v. Badlam, 9 Pick. 362; McKinstry v. Davis, 3 Cow. 389, 15 Am. Dec. 269; Pitts v. Meller, 2 Stran. 1167; Finch v. Duddin, 2 Stran. 1237; Langstaff v. Rain, 1 Wils. 149; Anonymous, 3 Wils. 124; Jackson v. Haines, 2 Cow. 462. But the later English cases show that after the arrest of a married woman she will be released from custody, unless she is possessed of separate estate which could be applied to the satisfaction of the writ. Hovey v. Starr, 42 Barb. 435; Evans v. Chester, 2 Mees. & W. 847; Chalk v. Deacon, 6 J. B. Moore, 128. In some of the United States, females are, by statute, exempt from arrest on execution. See ante, § 458a. In New York, females may be taken in execution on a judgment recovered for willful injuries to person, character, or property. Northern R. W. Co. v. Carpentier, 3 Abb. Pr. 259; 13 How. Pr. 222; Tracy v. Leland, 2 Sand. 729; 3 Code R. 47; Wheeler v. Hartwell, 4 Bosw. 684. But the term "female," as used in the statute of this state, has been held not to authorize the arrest of married women. Baldwin v. Kimmel, 16 Abb. Pr. 353; 1 Rob. 109; Schaus v. Putscher, 16 Abb. Pr. 353; 25 How. Pr. 463; Anonymous, 8 How. Pr. 134; 1 Duer, 613; Solomon v. Waas, 2 Hilt. 179.

<sup>165</sup> Jones v. Champion, Dick. 160.

against the person of a defendant clearly imply that its issuing shall be only in cases in which he has been guilty of some moral wrong either in contracting the debt or in withholding property from its satisfaction. If he is so situate, either from age, mental infirmity, disability declared by law, or from want of control over himself or his property, that this wrong cannot be imputed to him, he is not within the reason of the statute, and it will not be enforced against him. In Massachusetts, the statute declared that "no person shall be arrested on an execution for debt or damages in a civil action, except in actions for tort, unless the judgment creditor or some person in his behalf makes affidavit before a magistrate that the debtor has been guilty of one of the fraudulent or wasteful acts specified in the statute." A spendthrift who was under guardianship having been arrested under a judgment based on a contract, the arrest was adjudged to be forbidden by the statute. As he was under guardianship, having no control over his property, it was impossible that he should be guilty of any fraud or wrongful act in not applying his property to the satisfaction of the judgment.<sup>100</sup> For similar reasons the statute of that state was held not to justify the arrest of a minor. In determining this question, the court first epitomized the various statutory provisions bearing on the subject, and then said: "It seems to us that most of these provisions cannot be applied to an infant, without violating well-known and established principles of law; and therefore we infer that the legislature did not intend to authorize the arrest of infants, either upon mesne process or execution. The provisions were plainly intended to apply to persons

<sup>100</sup> Blake's Case, 106 Mass. 504.



who are *sui juris*, capable of managing their own affairs and controlling their own property. An infant is deemed in law to be incompetent to enter into contracts, or to manage and control his own affairs. He cannot employ an attorney to represent his interests or defend his rights in a legal proceeding. A judgment against him, obtained without the appointment of a guardian *ad litem*, is voidable, and may be reversed on a writ of error. . . . An infant, if arrested, not being capable of entering into contracts or of controlling his property, could not avail himself of the provisions of the statute intended for the relief of arrested debtors. He could not enter into a recognizance; he could not furnish any security so as to obtain sureties on his recognizance; he could not transfer and assign his property, or expose it to be taken on execution, and thus procure his discharge. It is no answer to say that, if we construe the statute to include infants, these powers would follow by implication. It is not reasonable to suppose that the legislature intended to annul the established principles of the law of infancy, and to confer upon infants, by indirection, the powers of persons of full age. The more reasonable inference is, that the statute was intended to apply to persons *sui juris*, and not to infants.”<sup>167</sup>

§ 460. **How Executed.**—Upon receiving a *capias ad satisfaciendum*, it is the duty of the officer to arrest the person named as defendant therein. He has no authority to arrest a person not named in the writ, though such person is the one intended to be named.<sup>168</sup>

<sup>167</sup> Cassler's Case, 139 Mass. 458.

<sup>168</sup> Miller v. Foley, 28 Barb. 630; Farnham v. Hildreth, 32 Barb. 277; Kelly v. Lawrence, 10 Jur., N. S., 36; 33 L. J. Ex. 197; 3 Hurl. & C. 1; 12 Week. Rep. 413; 10 L. P., N. S., 195; Evans v. Collins,

But, in many of the states, a person may be prosecuted by a fictitious name, where his true name is unknown. In such a case, a person might, no doubt, be lawfully arrested under a writ against him by a fictitious name, if there is anything to identify the person intended, so that the officer in making the arrest need not act capriciously or upon mere suspicion that the person arrested may be he whose name would have been inserted in the writ, had it been known. It seems hardly consonant with a decent respect for personal liberty that a writ should issue and be enforced which is apparently applicable to any and every human being of the same race and sex as the person arrested. But process of this degree of indefiniteness is authorized by various statutes regarding warrants in criminal prosecutions, and these statutes, and process issued in conformity therewith, seem to be sustained.<sup>169</sup>

The English statute,<sup>170</sup> made it unlawful to serve on the Lord's day "any writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace." An arrest attempted on that day,

5 Ad. & E., N. S., 804; *Brunskill v. Robertson*, 9 Ad. & E. 840; *Childers v. Wooler*, 2 El. & E. 287; *Griswold v. Sedgwick*, 6 Cow. 456; *Money v. Leach*, 3 Burr. 1742; *Shadgett v. Clipson*, 8 East, 328. But an officer is justified in arresting a defendant under a writ which pursues the name in which the judgment is obtained, though it is not his true name. *Fisher v. Magnay*, 1 Dowl. & L. 40; 5 Man. & G. 779; 6 Scott N. R. 588; 12 L. J. Com. P. 276. If a person procures himself to be arrested, by alleging that he is the defendant, the sheriff is justified in the arrest, but not in detaining the person arrested after notice that he is not the defendant. *Dunston v. Paterson*, 3 Jur., N. S., 982; 2 Com. B., N. S., 495; 26 L. J. Com. P. 267. In *Hammond v. People*, 32 Ill. 446, 83 Am. Dec. 286, it was held that a writ of habeas corpus would not lie to release one imprisoned under a ca. sa. upon the mere ground that he was not sued by his right name.

<sup>169</sup> *People v. Brown*, 59 Cal. 345.

<sup>170</sup> 29 Car. 2. c. 7, § 6.

was void, and the officer without justification.<sup>171</sup> In the United States Sunday arrests in criminal cases are quite generally upheld where shown to be necessary, but this support is withheld from such arrests when made in civil cases.<sup>172</sup> An arrest may be made at any hour of the day or night.<sup>173</sup> With respect to breaking inner and outer doors of dwelling-houses for the purposes of making arrests, the rules are the same as they are regarding the breaking of such doors for the purpose of making levies under writs of fieri facias.<sup>174</sup> An arrest must be made by the authority, but it need not be made by the hand, of the officer.<sup>175</sup> It is usually made by touching the defendant, and informing him that he is a prisoner.<sup>176</sup> This is regarded as sufficient in all cases.<sup>177</sup> But touching is not indispensable. Neither can an arrest be made by the mere words of the officer. It is sufficient, however, that the officer has the defendant where he can exercise control over

<sup>171</sup> Bingham on Judgments and Executions, 236; *Wilson v. Tucker*, Salk. 78; *Pearce v. Atwood*, 13 Mass. 324; *Hubbard v. Sanborn*, 2 N. H. 468.

<sup>172</sup> *Watts v. Commonwealth*, 5 Bush (Ky.), 309; *State v. Douglas*, 69 Ind. 544; *Keith v. Tuttle*, 28 Me. 326; *Pearce v. Atwood*, 13 Mass. 324.

<sup>173</sup> *Priddee v. Cooper*, 1 Bing. 66; *Maud v. Barnard*, 2 Burr. 812; *Anonymous*, 2 Chit. 357; *Wright v. Keith*, 24 Me. 158; *State v. Smith*, 1 N. H. 346.

<sup>174</sup> Bingham on Judgments and Executions, 235; see ante, § 256; *Gordon v. Clifford*, 28 N. H. 402; *Lee v. Gansell*, Lofft. 374; *Cowp.* 1; *Lloyd v. Sandilands*, 2 Moore, 207; *Johnson v. Leigh*, 1 Marsh. 565; 6 Taunt. 246; *Kerbey v. Denby*, 1 Mees. & W. 336; 2 Gale, 81; *Morrish v. Murray*, 2 Dowl. & L. 199; 13 Mees. & W. 52; 13 L. J. Ex. 261.

<sup>175</sup> Bingham on Judgments and Executions, 234; *Blatch v. Archer*, *Cowp.* 63.

<sup>176</sup> *Genner v. Sparks*, 6 Mod. 173; 1 Salk. 79.

<sup>177</sup> *Shandon v. Jervis*, 4 Jur., N. S., 737; 27 L. J. Q. B. 279; affirmed. 5 Jur., N. S., 156; 28 L. J. Ex. 156; El. B. & E. 935. In this case, the officer touched the defendant by putting his hand through a broken pane of glass.

him, that he assumes to exercise such control, and that the defendant acquiesces and submits himself to the officer's authority.<sup>178</sup> If, after a defendant is legally in custody, the officer receives another *capias ad satisfaciendum* against him, he need not make any new arrest. An arrest under one writ operates as a constructive arrest under all other writs that may come to the same officer's hands against the same defendant, provided that the first arrest is legal. If illegal, it does not dispense with the necessity for arrests under subsequent writs.<sup>179</sup> The officer will not be justified by his

<sup>178</sup> *Emery v. Chesley*, 18 N. H. 198; *Gold v. Bissel*, 1 Wend. 215; *Pike v. Hanson*, 9 N. H. 491; *Jones v. Jones*, 13 Ired. 448; *Russen v. Lucas*, 1 Car. & P. 153; *Russ. & M.* 26; *Field v. Ireland*, 21 Ala. 240; *Grainger v. Hill*, 4 Bing. N. C. 212; 5 Scott, 561; *Bingham on Judgments and Executions*, 234. The sufficiency of arrests is discussed in note to *Hawkins v. Commonwealth*, 61 Am. Dec. 151-164.

<sup>179</sup> *Watson on Sheriffs*, 135; *Bingham on Judgments and Executions*, 234; *Barratt v. Price*, 2 Moore & S. 634; 9 Bing. 566; 1 Dowl. P. C. 275; *Robinson v. Yewens*, 5 Mees. & W. 149; 7 Dowl. P. C. 377; 1 Horn & Hurl. 38; 3 Jur. 776; *Pearson v. Yewens*, 7 Scott, 435; 7 Dowl. P. C. 451; 5 Bing. N. C. 489; 3 Jur. 386; *Collins v. Yewens*, 10 Ad. & E. 370; 2 Perry & D. 439; 3 Jur. 951; *Ex parte Hreston*, 7 Jur., N. S., 432; 30 L. J. Chlc. 460; 3 De Gex, F. & J. 612; *Banach v. Newton*, 1 Q. B. 525; 1 Gale & D. 153; 5 Jur. 958; *Barclay v. Faber*, 1 Chit. 578; 2 Barn. & Adol. 743; *Barlow v. Hall*, 2 Anstr. 461. If a deputy has a defendant in custody under one writ, and another writ comes into the hands of the high sheriff, the defendant is constructively under the last writ also. If the deputy, in ignorance of the last writ, discharges the defendant on the satisfaction of the first, he and his principal are both guilty of a permissive escape, for it is always the duty of the sheriff, before releasing a defendant, to search his office for other writs. *Wheeler v. Hambright*, 9 Serg. & R. 390. This rule, however, was held not to apply where the defendant, at the time of the delivery of the second writ to the sheriff was at large within the prison limits, having given bond in due form. In such a case the mere delivery of the second writ was not, *ipso facto* and *eo instanti*, an arrest, so as to place the prisoner in custody and render the sheriff liable under the second writ for the prisoner's escape. *Tracy v. Whipple*, 8 Johns. 879.

writ if he arrests the wrong person,<sup>180</sup> unless his mistake was occasioned by the party arrested. When the defendant has been arrested, the officer must, with reasonable diligence, take him to the jail of the county, and keep him there confined until discharged by law.<sup>181</sup>

**§ 461. Of the Custody of the Defendant, and of Escapes.**—After arresting a defendant, the officer must, without needless delay, take him to the jail, and must there keep him in continuous confinement until he is discharged by law. And here must be noticed a material difference between the duty of an officer acting under a *capias ad respondendum* and his duty while executing a *capias ad satisfaciendum*. It is sufficient, under the former writ, for the officer to have the defendant ready to be surrendered in satisfaction of the judgment.<sup>182</sup> He may therefore allow the defendant his liberty without incurring any liability, provided he is able to surrender him when judgment is entered. But under the latter writ, the plaintiff is entitled to keep the defendant continuously in prison. The imprisonment must be continued until the judgment is satisfied, or the defendant is otherwise duly discharged from custody—"and this too, without reference to what may become of the writ, or whether it remains in force or has become *functus officio*."<sup>183</sup> If an officer

<sup>180</sup> *Kelley v. Lawrence*, 3 Hurl. & C. 1; 10 Jur., N. S., 636; 33 L. J. Ex. 197; 10 Week. Rep. 413; 10 L. T., N. S., 195; *Money v. Leach*, 1 W. Black. 563; 3 Burr. 174; *Anonymous*, 1 Chit. 580; *Rex v. Middlesex*, 2 Chit. 357.

<sup>181</sup> *Watson on Sheriffs*, 135; *Crocker on Sheriffs*, § 566; *Wool v. Turner*, 10 Johns. 420; *Benton v. Sutton*, 1 Bos. & P. 24; *Clifton v. Hooper*, 6 Q. B. 468.

<sup>182</sup> The temporary release of a defendant after his arrest on *mesne process* does not prevent his subsequent arrest under final process. *Meech v. Loomis*, 14 Abb. Pr. 428; 28 How. Pr. 209.

<sup>183</sup> *People v. Hanchett*, 111 Ill. 90.

allows the defendant to be at liberty but for a moment, he is guilty of permitting an escape.<sup>184</sup> And having voluntarily permitted an escape, he has no right to pursue and retake the defendant, nor even to keep him in custody if he should voluntarily return,<sup>185</sup> unless the plaintiff should elect to take out a new writ of *capias ad satisfaciendum*, and authorize its execution.<sup>186</sup> For a voluntary escape, the officer is responsible to the plaintiff for the full amount collectible from the defendant, irrespective of the solvency or insolvency of the latter.<sup>187</sup> Nor can the officer, by any

<sup>184</sup> Crocker on Sheriffs, §§ 566, 608, 612; *Atkinson v. Matteson*, 2 Term Rep. 176; *Langdon v. Hathaway*, 1 N. H. 367; *Williams v. Mostyn*, 4 Mees. & W. 152; *Impey on Sheriffs*, 111; *Nall v. State*, 34 Ala. 265; *Hopkinson v. Leeds*, 78 Pa. St. 396. This rule is unrelaxed, even though defendant was in custody but for a moment. *Nicholl v. Darley*, 2 Y. & J. 399.

<sup>185</sup> *Adams v. Turrentine*, 8 Ired. L. 151; *Hopkinson v. Leeds*, 78 Pa. St. 396; *Servis v. Marsh*, 38 Fed. Rep. 794; *Hoagland v. State*, 22 Ind. App. 204, 72 Am. St. Rep.

<sup>186</sup> *Sherburn v. Beattie*, 16 N. H. 437; *Cheever v. Mirrick*, 2 N. H. 376; *Brown v. Getchell*, 11 Mass. 11; *Littlefield v. Brown*, 1 Wend. 398; *Appleby v. Clark*, 10 Mass. 59; *Ravenscroft v. Eyles*, 2 Wils. 294; *Atkinson v. Matteson*, 2 Term Rep. 176; *Foster v. Jackson*, Hob. 60, note; *Bruce v. Snow*, 20 N. H. 484; *Lansing v. Fleet*, 2 Johns. Cas. 3, 1 Am. Dec. 142; *Koonen v. Maddox*, 2 Har. & G. 106; *Houghton v. Wilson*, 10 Gray, 365.

<sup>187</sup> *Hoagland v. State*, 22 Ind. App. 204, 72 Am. St. Rep.; *Robertson v. Taylor*, 2 Chit. 454; *Bonafous v. Walker*, 2 Term Rep. 126; *Shewell v. Fell*, 3 Yeates, 17; *Rawson v. Dole*, 2 Johns. 454; *Bowen v. Huntington*, 3 Conn. 423; *Porter v. Sayward*, 7 Mass. 377; *State v. Hamilton*, 33 Ind. 502; *Futch v. Walker*, 1 Ball. 98; *Duncan v. Klinefelter*, 5 Watts, 141, 30 Am. Dec. 295. In England, by statutes 5 & 6 Vict., c. 98, § 31, the liability of the sheriff is limited to the damages actually sustained by the plaintiff. *Moore v. Moore*, 25 Beav. 8; 4 Jur., N. S., 250; 27 L. J. Ch. 385. But in estimating these damages, the jury may consider the expectations of the defendant, and all the probabilities that his detention in custody would have caused the payment of the judgment. *Macrae v. Clarke*, 1 Har. & R. 479; L. R. 1 Com. P. 403; 35 L. J. Com. P. 247; 12 Jur., N. S., 708; 14 Week. Rep. 655; 14 L. T., N. S., 408.

action against the defendant, recover back moneys paid out for having suffered a voluntary escape.<sup>188</sup>

Officers are also liable for escapes made without their consent or connivance. They are responsible for the custody of the defendant; and having authority to summon to their aid the whole power of the county, they are not allowed to exonerate themselves from the liability arising from an escape, unless they can show that it arose from the act or fault of the plaintiff,<sup>189</sup> or from an act of God, or a public enemy.<sup>190</sup> But where an escape is not permissive, the sheriff may pursue and retake the defendant, and may hold him in custody until he is indemnified for the escape.<sup>191</sup> If the defendant is retaken before a suit is brought for the escape, the recapture forms a good defense to such suit.<sup>192</sup> If the sheriff is compelled to pay moneys owing to an escape to which he did not assent, he may, in an action against the defendant, recover back the amount so paid.<sup>193</sup> If a judgment against the sheriff be for the whole amount of defendant's debt, and the judgment is duly satisfied, it follows that defendant's debt is satisfied as against the plaintiff, who can rightly claim but one payment of his debt.<sup>194</sup> But this has

<sup>188</sup> *Pitcher v. Bally*, 8 East. 171; *Crocker on Sheriffs*, § 615.

<sup>189</sup> *Van Wormer v. Van Voast*, 10 Wend. 356; *Drake v. Chester*, 2 Conn. 473; *Dowdel v. Hamm*, 2 Watts, 61; *Dexter v. Adams*, 2 Denio, 646; *Love v. McAllister*, 4 Hayw. 65.

<sup>190</sup> *Alsept v. Eyles*, 2 H. Black. 108; *O'Neil v. Marson*, 5 Burr. 2812; *Elliott v. Norfolk*, 4 Term Rep. 789; *Haines v. E. I. Co.*, 11 Moore P. C. C. 39; *Fairchild v. Case*, 24 Wend. 383.

<sup>191</sup> *Brown v. Getchell*, 11 Mass. 11.

<sup>192</sup> *Chambers v. Jones*, 11 East. 406; *Davis v. Chapman*, 2 Man. & G. 921; 3 Scott N. R. 238; 9 Dowl. P. C. 645; 5 Jur. 654; *Crocker on Sheriffs*, § 609. Fresh pursuit without actual recapture will not avail the officer as a defense to an action for an escape, although the escaping debtor died before the officer had it in his power, by due diligence to recapture him. *Whicker v. Roberts*, 10 Ired. 485.

<sup>193</sup> *Crocker on Sheriffs*, § 615.

<sup>194</sup> *Gaudin v. McKilligan*, 7 New Bruns. 477.

been doubted.<sup>195</sup> But the liability of an officer for an escape made without his knowledge or assent is said to be limited to the damages actually suffered by the plaintiff, and not to be coextensive with the amount due from the defendant.<sup>196</sup> An officer cannot avoid his liability for an escape by showing errors or irregularities in the judgment<sup>197</sup> or process,<sup>198</sup> unless they are of so serious a nature as to render it void. An escape, to support an action therefor, must have been from the lawful custody of the officer against whom recovery is sought.<sup>199</sup> An officer may plead in mitigation of damages that plaintiff's claim against the escaped prisoner was barred by the statute of limitations,<sup>200</sup> but he cannot avoid liability by showing that the escape was due to a lack or insufficiency of jail accommodations.<sup>201</sup>

<sup>195</sup> *Cheever v. Mirrick*, 2 N. H. 376. Compare *Allen v. Holden*, 9 Mass. 125.

<sup>196</sup> *Richardson v. Spencer*, 6 Ohio, 13.

<sup>197</sup> *Chapman v. Lane*, 1 Gale & D. 523; 11 Ad. & E. 980; *Hutchinson v. Brand*, 6 How. Pr. 73; *Wesson v. Chamberlain*, 3 N. Y. 331.

<sup>198</sup> *Hinman v. Brees*, 13 Johns. 529; *Scott v. Shaw*, 13 Johns. 378; *Ross v. Luther*, 4 Cow. 158, 15 Am. Dec. 341; *Crocker on Sheriffs*, § 611; *Howard v. Crawford*, 15 Ga. 424; *Garton v. Frizzell*, 20 Ill. 295; *Hitchcock v. Baker*, 2 Allen, 431; *Hutchins v. Edson*, 1 N. H. 139; *Goodwin v. Griffin*, 88 N. Y. 630; *Ellis v. Gee*, 1 Murph. (N. C.) 445.

<sup>199</sup> *Partridge v. Westervelt*, 13 Wend. 501.

<sup>200</sup> *Slocum v. Riley*, 145 Mass. 370.

<sup>201</sup> *Stone v. Wilson*, 10 Gratt. 544; *Brown Co. v. Butt*, 2 Ohio, 853; *Shoemaker v. Marriott*, 5 G. & J. 410; *Kepler v. Baker*, 13 Oh. St. 177; *Smith v. Hart*, 1 Brev. (S. C.) 146; *Green v. Hern*, 2 P. & W. 167. This is in accordance with the common-law rule which required the sheriff to furnish the debtor's prison. *Gwinn v. Hubbard*, 3 Blackf. 14. Where, however, the duty of furnishing gaols is, by statute, made incumbent, not upon the sheriff, but upon some other specified officer, board, or authority, and the sheriff has no power to coerce the performance of this duty, the latter, having incurred and satisfied a liability for an escape made possible by dereliction in the performance of this duty, should have



§ 462. **The Effect of the Arrest of Defendant, as Suspending the Judgment.**—The taking of the defendant in execution has often been said to produce a satisfaction of the judgment.<sup>202</sup> But the judgment is not in fact thereby satisfied absolutely. The satisfaction is very similar to that produced by a levy upon chattels sufficient in value to discharge the plaintiff's demand. In other words, it is conditional, and may turn out to be no satisfaction whatever. While the defendant continues in custody, however, the satisfaction is real and substantial, to this extent, at least, that the judgment is, for the time being, thereby so completely suspended that the plaintiff cannot prosecute any further proceedings under it,<sup>203</sup> except that where there

recourse against the derelict party. This right of recourse is recognized by statute in some states. *Stone v. Wilson*, 16 Gratt. 545. Compare *Commrs. of Brown Co. v. Butt*, 2 Ohio. 349, overruled by *Commrs. of Hamilton Co. v. Mighels*, 7 Oh. St. 110.

<sup>202</sup> *Horn v. Horn*, Amb. 79; *Howe v. B. N. Y. & E. R. R. Co.*, 33 Barb. 124; *Impey on Sheriffs*, 111; *Ex parte Knowell*, 13 Ves. 193; *Cooper v. Bigalow*, 1 Cow. 56; *Bowrell v. Zigler*, 10 Ohio. 362; *Burnaby's Case*, 1 Strange, 653; *Bank of Beloit v. Beale*, 7 Bosw. 611; *Stover v. Duren*, 3 Strob. 448, 51 Am. Dec. 634. A *capias ad satisfaciendum* countermanded before execution neither suspends nor satisfies the judgment on which it issued. *Semple v. Keen*, 3 Hurl. & N. 753; 28 L. J. Ex. 151; *National Ass. Co. v. Best*, 27 L. J. Ex. 19; 2 Hurl. & N. 603.

<sup>203</sup> *Blumfield v. Usewick*, 5 Co. 86 b; *Clement v. Garland*, 53 Me. 427; *Noe v. Christie*, 15 Abb. Pr., N. S., 346; *Taylor v. Thomson*, 5 Pet. 357; *Fassett v. Talmadge*, 15 Abb. 205; *Thompson v. Parish*, 5 Com. B., N. S., 685; 5 Jur. N. S., 986; 28 L. J. Com. P. 153; *Twinning v. Foot*, 5 Cush. 512; *Hamilton v. Bredeman*, 12 Rich. 464; *Richard v. Davis*, Barnes. 203; *Sharpe v. Speckenagle*, 3 Serg. & R. 465; *Freeman on Judgments*, § 477. A judgment creditor having taken his debtor's body under execution cannot sue upon notes taken as collateral security for the payment of his judgment. *Wakeman v. Lyon*, 9 Wend. 241. "The body is not satisfaction," said Chief Justice Marshall in *United States v. Stansbury*, 1 Pet. 574, "but is held as the surest means of coercing satisfaction. The law will not permit a man to proceed, at the same time, against the person and estate of his debtor."

are two or more defendants, the taking of one of them in execution does not suspend the plaintiff's right to take the other.<sup>204</sup> So if goods are levied upon and placed in the custody of a receiptor, his liability does not terminate when the defendant is subsequently taken in execution.<sup>205</sup> The satisfaction of the judgment resulting from the imprisonment of the defendant may be urged in favor of others. If a bond has been given, conditioned that he will pay the judgment, no action can be sustained against his sureties thereon, for the fact of his being in custody is, when offered in evidence in the action, tantamount to proof that the judgment is no longer existent.<sup>206</sup> In the case of a levy upon chattels, their release, with the assent of the defendant, express or implied, doubtless terminates, so far as he is concerned, the conditional satisfaction produced by the levy. But the release of defendant from execution by his assent does not revive the judgment, unless the plaintiff was powerless to prevent it. At the common law, the discharge of the judgment continued, unless the debtor escaped from prison without the sheriff's assent, or obtained his creditor's assent to his release by fraud.<sup>207</sup> Statutes enacted during the reign of James the First, and of William the Third, authorized the arrest under a new writ of persons released because of their privilege from arrest, or who had escaped from prison by "any ways or means howsoever," and, furthermore, authorized proceedings against the property of one who

<sup>204</sup> *Blomefield v. Wythe*, Sir F. Moore, 459; *Penn v. Remsen*, 24 How. Pr. 503.

<sup>205</sup> *Twining v. Foot*, 5 Cush. 512.

<sup>206</sup> *Koenig v. Steckel*, 58 N. Y. 475.

<sup>207</sup> *Mounson v. Cleyton*. Cro. Car. 240; *Baker v. Ridgway*, 9 Moore, 114; 2 Blng. 41; *Little v. Newburyport Bank*, 14 Mass. 443.

had died while imprisoned. A discharge of the defendant from imprisonment by consent of himself and of the plaintiff does not revive the judgment. It remains fully satisfied, though the release was obtained by promises made by or on behalf of defendant which were never fulfilled, or though the defendant agreed that the judgment might be subsequently enforced, and himself taken in execution.<sup>208</sup> An execution issued after defendant has been taken in execution, and before anything has occurred to annul the satisfaction produced thereby, is, in legal effect, a writ to enforce a satisfied judgment, and any sale made thereunder is void.<sup>209</sup> In several cases, it has been held that the suspension of a judgment resulting from the arrest of a defendant on a *capias ad satisfaciendum* does not destroy the judgment lien.<sup>210</sup> A majority of the authorities sustains an adverse conclusion, and holds that, on the revival of a judgment, its lien will not overreach liens and rights acquired under the defendant during the period when the judgment was suspended by his imprisonment.<sup>211</sup> But under a statute requiring the release of the defendant when he surrenders to the officer real or personal property sufficient to satisfy the writ, the lien upon such property, when delivered in execution, must be treated as though the defendant had not been imprisoned.<sup>212</sup>

<sup>208</sup> *Coburn v. Palmer*, 10 Cush. 273; *Nowell v. Waitt*, 121 Mass. 554; *Doane v. Bartlett*, 4 Allen, 74.

<sup>209</sup> *Kennedy v. Duncklee*, 1 Gray, 65.

<sup>210</sup> *Mazyck v. Coll*, 3 Rich. 235; *Hall v. Moyer*, 2 Ball. 9; *Trustees v. Pratt*, 10 Md. 5; *Owen v. Glover*, 2 Cranch C. C. 578.

<sup>211</sup> *Jackson v. Benedict*, 13 Johns. 533; *Griswold v. Hill*, 2 Palne C. C. 492; *Snead v. McCoull*, 12 How. 407; *Rockhill v. Hanna*, 15 How. 189; *Chapman v. Hatt*, 11 Wend. 41; *Cohen v. Grier*, 4 McCord, 509; *Freeman v. Ruston*, 4 Dall. 214.

<sup>212</sup> *Douglas v. Wallace*, 11 Ohio, 43.

§ 463. The Revival of a Judgment after a defendant has been taken in execution may be produced—1. By his escape from custody without the act or connivance of the plaintiff;<sup>213</sup> 2. By his discharge on account of nonpayment of the prison fees,<sup>214</sup> or for irregularity in the writ under which he was arrested,<sup>215</sup> or because of his compliance with the statute for the relief of insolvent debtors.<sup>216</sup> The death of the debtor while in prison, his release on the ground of privilege, and his escape “by any ways or means howsoever,” are, by statute, contingencies in either of which execution may issue against his property.<sup>217</sup>

§ 464. The Release of the Defendant by the Act or with the Consent of the plaintiff is, as we have shown, an absolute and irrevocable satisfaction of the judgment, irrespective of any understanding or agreement to the contrary, or that the defendant would in certain contingencies redeliver himself to be held under execution.<sup>218</sup> If there are two or more defendants,

<sup>213</sup> *Bowrell v. Zigler*, 19 Ohio, 362; *Ballard v. Averitt*, Tayl. (N. C.) 69; *Freeman v. Smith*, 7 Ind. 582; *Brown v. Kendall*, 8 Allen, 209; *Wesson v. Chamberlain*, 3 N. Y. 331; *McGuinty v. Herrick*, 5 Wend. 240.

<sup>214</sup> *Prentiss v. Hinton*, 6 Blackf. 35; *Strode v. Broadwell*, 36 Ill. 419; *Hidden v. Saunders*, 2 R. I. 391; *Stover v. Duren*, 3 Strob. 448.

<sup>215</sup> *McCormick v. Melton*, 1 Crompt. M. & R. 525; 3 Dowl. P. C. 215; 5 Tyrw. 147.

<sup>216</sup> *Nadin v. Battie*, 5 East, 147; *Nadin v. Paten*, 1 Smith, 362; *Miller v. Miller*, 25 Me. 110; *Owen v. Glover*, 2 Cranch C. C. 578.

<sup>217</sup> *Coburn v. Palmer*, 10 Cush. 274; *Freeman on Judgments*, § 476; Statute 21 Jac. 1., chap. 24. and Statute 8 & 9 Wm. III., chap. 27. But at common law, the death of defendant in prison did not revive the judgment, nor authorize the plaintiff to sue out any other writ. *Williams v. Cutteris*, Cro. Jac. 136; *Forster's Case*, Sir F. Moore, 857; *Foster v. Jackson*, Hob. 52. But where there were two or more defendants, the death of one while in custody did not release the others. *Blumfield v. Usewick*, 5 Coke, 86 b; *Shaw v. Cutteris*, Cro. Eliz. 851.

<sup>218</sup> *Blackburn v. Stupart*, 2 East, 243; *Yates v. Van Rensselaer*, 5 Johns. 364; *Jacques v. Withy*, 1 Term Rep. 557; *Tanner v. Hague*,

the release of any one of them is as complete a satisfaction of the judgment as the release of all of them could be, under like circumstances.<sup>219</sup> In New Hampshire, the discharge of a defendant from custody does not satisfy the judgment, the common-law rule having there been supplanted by statute.<sup>220</sup> In South Carolina, a plaintiff may, by statute, temporarily release defendant, and thereafter reimprison him.<sup>221</sup> In Maryland, the discharge of the defendant from prison, by his assent, operates as a revival rather than as a satisfaction of the judgment.<sup>222</sup> In Massachusetts, a defendant who, after being temporarily released, returns to custody according to agreement, may be retained in jail.<sup>223</sup> In Vermont, the discharge of a debtor from custody upon his promise to pay his debt does not satisfy the judgment.<sup>224</sup> In those jurisdictions which follow the general rule that if a creditor

7 Term Rep. 420; *Prentiss v. Hinton*, 6 Blackf. 35; *Utica I. Co. v. Power*, 3 Paige, 365; *Cattlin v. Kernott*, 3 Com. B., N. S., 796; 4 Jur., N. S., 281; 27 L. J. Com. P. 186; *Seymour v. Clarke*, 13 Irish C. L. 537; *Abbott v. Osgood*, 38 N. H. 280; *Vigers v. Aldrich*, 4 Burr. 2482; *State v. Richardson*, 18 Ala. 109; *King v. Goodwin*, 16 Mass. 63; *Lathrop v. Briggs*, 8 Cow. 171; *Poucher v. Holley*, 3 Wend. 184; *Kasson v. People*, 44 Barb. 347; *Bonesteel v. Garlinghouse*, 60 Barb. 338.

<sup>219</sup> *Clark v. Clement*, 6 Term Rep. 525; *Ransom v. Keyes*, 9 Cow. 128; *Ballam v. Price*, 2 Moore. 235; *Bailey v. Kimbal*, 1 Chip. D. 151; *Herring v. Dorell*, 8 Dowl. P. C. 604; 4 Jur. 800; *Whiteacres v. Hamkinson*, Cro. Car. 75; *Heeles v. Frazer*, 7 Scott, N. S., 469; *Kimball v. Molony*, 3 N. H. 376; *Denton v. Godfrey*, 11 Jur. 800. But the release of a principal debtor cannot be pleaded by his guarantor or indorser in bar of a subsequent action brought by the creditor upon the contract of guaranty or indorsement. See *Hayling v. Mulhall*, 2 W. Bl. 1235; *Terrell v. Smith*, 8 Conn. 426. Contra, *McFadden v. Parker*, 4 Dall. 275.

<sup>220</sup> *Abbott v. Osgood*, 38 N. H. 280.

<sup>221</sup> *Eggart v. Barnstine*, 3 McCord, 162.

<sup>222</sup> *Lawson v. Snyder*, 1 Md. 71.

<sup>223</sup> *Little v. Newburyport Bank*, 14 Mass. 443.

<sup>224</sup> *Foster v. Callamer*, 10 Vt. 466. See *Willard v. Lull*, 20 Vt. 373.

discharge his debtor from arrest it is equivalent to a satisfaction of his debt, it would appear that in order to bring a case within the general rule the consent of the plaintiff must be freely given and not obtained by force or fraud on the part of the debtor.<sup>225</sup> The arrest must also be clearly made out, unequivocal, and made for the purpose of executing the process.<sup>226</sup>

§ 465. Discharge of Defendant, how Obtained by Order of Court.—The court which has issued a *capias ad satisfaciendum* has general control over the writ, and will exercise this control whenever necessary to prevent or to discontinue an abuse of the process.<sup>227</sup> If the defendant is seized while privileged from arrest, he may secure his release by motion in the court whence the writ issued; or if his privilege arises from his duty to be in attendance on any court, he may also procure an order for his release by a motion made in that court.<sup>228</sup> He can in either case obtain his discharge by aid of the writ of *habeas corpus*,<sup>229</sup> as well as by motion. Where a debtor is imprisoned under a judgment based upon a declaration containing several counts, he may show, upon a petition for discharge from custody, that the judgment was based upon a count which did not authorize the issuance of a *ca.*

<sup>225</sup> *Baker v. Ridgway*, 2 Bing. 41; *Little v. Newburyport Bank*, 14 Mass. 447; *Abbott v. Osgood*, 38 N. H. 283; *Rawl v. Guilleaume*, 56 How. Pr. 308.

<sup>226</sup> *Foster v. Callamer*, 10 Vt. 466.

<sup>227</sup> *Smith v. Knapp*, 30 N. Y. 581.

<sup>228</sup> *Attorney-General v. Skinner's Co.*, 1 Coop. 1; *Pitt v. Evans*, 2 Dowl. P. C. 223; *Solomon v. Underhill*, 1 Camp. 229; *Ex parte Tillotson*, 1 Stark. 470; *Swan v. Dakins*, 16 Com. B. 77; 3 Car. Law Rep. 602; 1 Jur., N. S., 378; 24 L. J. Com. P. 131; *Flight v. Cook*, 1 Dowl. & L. 714; 8 Jur. 125.

<sup>229</sup> *People v. Willett*, 26 Barb. 78; 6 Abb. Pr. 37; *Wiles v. Brown*, 8 Barb. 37.

sa.<sup>230</sup> Where the defendant's right to the privilege which he claims is quite doubtful, he will, in England, be required to resort to his writ of privilege to establish the validity of his claim.<sup>231</sup> After the death of a plaintiff while defendant is in custody, the latter will be released, if it appears that there is no probability that any letters testamentary or of administration will be taken out on the estate of the former.<sup>232</sup> The court out of which the writ issued will order the release of a defendant who has procured his discharge by complying with the provisions of a bankrupt act.<sup>233</sup> An officer is justified in releasing a defendant under an order of court erroneously made, requiring him so to do;<sup>234</sup> but if the order is void on its face, as where it does not disclose facts sufficient to confer jurisdiction on the court whence it issued, the officer is liable for an escape if he obeys it.<sup>235</sup> In Illinois, an imprisoned debtor may be discharged if his creditor fails to

<sup>230</sup> *Kitson v. Ellinger*, 35 Ill. App. 55.

<sup>231</sup> *Luntley v. Battine*, 2 Barn. & Al. 234; *Whittingham v. De la Rieu*, 2 Chit. 53; *Leslie v. Disney*, 3 Dowl. P. C. 437; 1 Crompt. M. & R. 578; 5 Tyrw. 181.

<sup>232</sup> *Parkinson v. Horloch*, 2 W. R. 240; *Broughton v. Martin*, 1 Bos. & P. 176; *Gore v. Wright*, 1 Dowl., N. S., 864; 6 Jur. 605; *Camp v. Pote*, 7 Dowl. & L. 289; 8 Com. B. 375; *Risdale v. Lautour*, 2 Lown. M. & P. 318. But no release will be ordered unless it is quite certain that no effort will be made to procure the appointment of an executor or administrator. *Dunsford v. Gouldsmith*, 8 Moore, 145; *Fothergill v. Walton*, 1 Moore & P. 743; 4 Bing. 711; *Cox v. Pritchard*, 2 Lown. M. & P. 298.

<sup>233</sup> *Thompson v. Harding*, 3 Com. B., N. S., 254; 4 Jur., N. S., 94; 27 L. J. Com. P. 38.

<sup>234</sup> *Wilckens v. Willet*, 1 Keyes, 524; *Hart v. Dubois*, 20 Wend. 236.

<sup>235</sup> *Bullymore v. Cooper*, 2 Lans. 71; 46 N. Y. 236. The order must appear on its face to have been made by the court. *Hayes v. Bowe*, 12 Daly, 193; though jurisdictional facts not appearing have been allowed to be established *allunde*. *Schaffer v. Riseley*, 44 Hun, 6.

advance the debtor's board to the jailer.<sup>236</sup> A decision resulting from proceedings prosecuted to obtain an order for the release of a defendant is conclusive on the parties, and the matters involved in such decision cannot be relitigated at a subsequent period.<sup>237</sup> Where there are two or more defendants, an order not to seize one of them does not entitle the others to a like immunity, nor to their release if already in custody.<sup>238</sup> While the statutes of a majority of the states of the American Union contain provisions authorizing an execution against the person of the defendant in certain contingencies, they also contain provisions under which he may obtain his discharge, either at once or after a brief period, if really unable to pay the debt for which he was taken in execution. In New York, if the writ or writs under which the defendant has been arrested exceed five hundred dollars, he cannot apply for his discharge until he has been imprisoned at least three months.<sup>239</sup> The application must be in the form of a petition, to which must be annexed schedules of his property and debts, verified by his affidavit. The affidavit must also state that he has not "at any time or in any manner whatsoever, disposed of or made over any part of his property, not exempt by express provision of law from levy and sale by virtue of an execution, for the benefit of himself or his family, or disposed of or made over any part of his property with intent to injure or defraud any of his creditors."<sup>240</sup> If the court on a hearing, of which the creditors are entitled to notice, is satisfied that the petition and

<sup>236</sup> *Strohelm v. Delmel*, 73 Fed. Rep. 430; S. C. 77 Fed. Rep. 802.

<sup>237</sup> *Matter of Thomas*, 10 Abb. Pr., N. S., 114; *Matter of Rosenberg*, 10 Abb. Pr., N. S., 450.

<sup>238</sup> *Fake v. Edgerton*, 5 Duer, 681; 3 Abb. Pr. 229.

<sup>239</sup> N. Y. Code Civ. Proc., § 2202.

<sup>240</sup> N. Y. Code Civ. Proc., § 2204.



schedule are correct, and that the petitioner's proceedings are just and fair, it must make an order, directing the petitioner to execute, to one or more trustees, an assignment of all his property not exempt from execution, or so much thereof as is sufficient to satisfy the execution under which he is imprisoned.<sup>241</sup> When this order is complied with, and all property capable of manual delivery is delivered to the trustees, the court must make an order discharging the petitioner from imprisonment.<sup>242</sup> "If the petitioner is convicted of perjury, committed in any of the proceedings upon his petition, any judgment creditor, by virtue of whose execution he was imprisoned may issue a new execution against his person."<sup>243</sup> The defendant cannot obtain any discharge from imprisonment, as against a judgment for a debt or duty to the United States, or for a debt or duty to the state, for taxes or for money received or collected by him as a public officer or in a fiduciary capacity.<sup>244</sup> The other states have also provided for the discharge of defendants from execution, and their statutes upon the subject are generally less stringent and more easily complied with than those of New York.<sup>245</sup> A discharge under these statutes annuls the conditional satisfaction of the judgment, produced by taking the defendant in execution, so far as to authorize the subsequent issuing of writs against his property. As a general rule, the privilege of obtaining a discharge by taking the poor debtor's oath extends to all persons imprisoned for debt, but in some

<sup>241</sup> N. Y. Code Civ. Proc., § 2208.

<sup>242</sup> *Ibid.*, § 2212.

<sup>243</sup> *Ibid.*, § 2214.

<sup>244</sup> *Ibid.*, §§ 1969, 2218.

<sup>245</sup> Cal. Code Civ. Proc., §§ 1143-1154; *Cassier's Case*, 139 Mass. 459; *In re Macalg*, 137 Mass. 467; *Ex parte Lamson*, 50 Cal. 306; and see statutes cited ante, § 451; Gen. Stats. Nev. 1885, §§ 3835-3844.

states it is denied to persons imprisoned in actions of tort.<sup>246</sup> In Rhode Island a statute was adjudged constitutional which admitted a tort debtor, imprisoned upon execution, to take the poor debtor's oath and obtain a discharge.<sup>247</sup> In Massachusetts a judgment debtor found guilty on charges of fraud may have the benefits of the poor debtor's oath upon application after the expiration of his sentence of imprisonment.<sup>248</sup>

**§ 466. Discharge of Defendant by Order of Plaintiff, or by Payment.**—Unless the defendant is discharged from custody by an order of court, the sheriff has no right to release him except upon the order of the plaintiff, or upon the payment of the judgment. Neither the sheriff nor the plaintiff's attorney has any authority to release the defendant, unless the judgment is paid in lawful money.<sup>249</sup>

**§ 467. Rearrest of Defendant.**—Where a defendant is regularly arrested and imprisoned under execution, and is not guilty of an escape, he is not subject to any second arrest based upon the same cause of action as the first. He is, however, subject to rearrest when he

<sup>246</sup> *Gooch v. Stephenson*, 15 Me. 129. Compare *Nelson v. Ladd*, 47 N. H. 343; *Barber v. Chase*, 3 Vt. 340.

<sup>247</sup> *In re Nichols*, 8 R. I. 50.

<sup>248</sup> Mass. Pub. Stats., 1882, ch. 162, § 52. Formerly the contrary was true. *Dennis' Case*, 110 Mass. 18.

<sup>249</sup> *Kellogg v. Gilbert*, 10 Johns. 220, 6 Am. Dec. 335; *Renedict v. Smith*, 10 Paige, 126; *Simonton v. Barrell*, 21 Wend. 362; *Crary v. Turner*, 6 Johns. 51. But in England the power of attorneys to order the release of defendants in custody has been extended by statutes 15 & 16 Vict., chap. 76, § 126. *Connop v. Challis*, 2 Ex. 484; 6 Dowl. & L. 48; 17 L. J. Ex. 319; *Savory v. Chapman*, 3 Perry & D. 604; 11 Ad. & E. 829; 8 Dowl. P. C. 656; 4 Jur. 411. In Pennsylvania and Vermont a contrary rule, with respect to the power of attorneys in this respect, has been announced. *Scott v. Sellar*, 5 Watts, 235; *Hopkins v. Willard*, 14 Vt. 475.

was released on account of a temporary privilege which has terminated,<sup>250</sup> or because the writ under which he was taken was void,<sup>251</sup> or was set aside for irregularity;<sup>252</sup> and also where he has escaped from custody without the consent of the plaintiff.<sup>253</sup> It has been held, erroneously, as we think, that a defendant, released on account of the insufficiency of the affidavit on which his arrest was ordered, cannot be rearrested in the same action.<sup>254</sup> But if a defendant is released from custody under such circumstances that he cannot be rearrested in that action, the plaintiff cannot arrest him in any subsequent suit based on the same cause of action, though the second action is in form different from the first.<sup>255</sup>

<sup>250</sup> Ante, §§ 457, 459; *Petrie v. Fitzgerald*, 1 Daly. 401; *Van Wezel v. Van Wezel*, 1 Edw. Ch. 118; *Humphrey v. Cumming*, 5 Wend. 90; *Commonwealth v. Brickett*, 8 Pick. 137.

<sup>251</sup> *Schadle v. Chase*, 16 How. Pr. 413.

<sup>252</sup> Ante, § 457; *Plomer v. Bull*, 5 Ad. & E. 823. Upon the reversal of an order setting aside process as void, there cannot be an arrest under the same process. *Carrigan v. Washburn*, 9 N. Y. Supp. 541. Compare *People v. Healy*, 128 Ill. 9.

<sup>253</sup> Ante, § 461.

<sup>254</sup> *Enoch v. Ernst*, 21 How. Pr. 96.

<sup>255</sup> *Wright v. Ritterman*, 1 Abb. Pr., N. S., 428; 4 Robt. 704; *Wells v. Gurney*, 8 Barn. & C. 769; *People v. Kelly*, 1 Abb. Pr., N. S., 432; *In re Johnson*, 7 Robt. 269. In New York it is held that where a defendant imprisoned for nonpayment of alimony previously accruing has remained in prison for the statutory period, he cannot be again imprisoned for the nonpayment of alimony accruing during his imprisonment. *Winton v. Winton*, 5 N. Y. Supp. 537, affirmed, 117 N. Y. 623.

## CHAPTER XXXIV.

## EXECUTIONS FOR THE POSSESSION OF REAL AND PERSONAL PROPERTY.

- § 468. Writs for the possession of personal property.
- § 469. Taking possession of real estate without the aid of a writ.
- § 470. Issuing writs for the possession of real estate.
- § 471. Form of writs of possession of real estate.
- § 472. Compelling and controlling the execution of writs of possession.
- § 473. Power and authority of an officer acting under a writ of possession.
- § 474. How to be executed.
- § 475. Who may be dispossessed under.
- § 476. Restitution after wrongful dispossession.
- § 477. Proceedings where defendants retake possession.

**§ 468. Writs for the Possession of Personal Property.** At the common law, two actions were resorted to for the purpose of obtaining the possession of specific chattels, namely, detinue and replevin. But neither of these actions necessarily accomplished the purpose for which it was originated, for in neither did any writ issue requiring the sheriff to place the prevailing litigant in the possession of his property. The judgment in detinue, if in favor of the plaintiff, affirmed his right to the possession of his property. The defendant could not satisfy such judgment by paying the value of the property unless the plaintiff saw proper to accept such payment.<sup>1</sup> Nor could the defendant be compelled to pay such value if he tendered the return of the prop-

<sup>1</sup> *Jordan v. Thomas*, 34 Miss. 72, 69 Am. Dec. 387; *Vines v. Brownrigg*, 1 Dev. & B. 239; *Bates v. Gordon*, 3 Call, 555; *Robinson v. Richards*, 45 Ala. 354; *Keith v. Johnson*, 1 Dana, 604, 25 Am. Dec. 167.

erty.<sup>2</sup> But the only means of compelling the defendant to comply with the judgment by restoring the property was through the issue of a *distringas*, under which repeated distresses of his chattels could be made.<sup>3</sup> To avoid these distresses, he would usually comply with the judgment. In Tennessee, no other writ can issue until a *distringas* has proved ineffectual.<sup>4</sup> But after a *distringas* has been resorted to without producing satisfaction, the judgment may be enforced by a *fiery facias*, or a *capias ad satisfaciendum*, or by such other writ as would be proper, were the judgment for the recovery of money merely.<sup>5</sup>

In replevin, at common law, the only writ requiring the delivery of chattels was issued on a judgment in favor of the defendant. It was called the writ *de retorno habendo*.<sup>6</sup> If the officer returned to this writ that the chattels had been eloigned, or removed by the plaintiff to places unknown, the defendant might have a *capias in withernam* to take other chattels in lieu of those eloigned, or he might proceed against the plaintiff's pledges.<sup>7</sup> In the greater portion of the United States, whenever a person is adjudged to be entitled to the possession of any personal property, he may have an execution requiring the officer "to deliver pos-

<sup>2</sup> *Carson v. Applegarth*, 6 Nev. 187.

<sup>3</sup> 3 Bla. Com. 413; *Tomlins' Law Dict.*, tit. *Distringas*. For the law now in force in England governing the execution of judgments in detinue, see 17 & 18 Vtct., c. 125, § 78; 19 & 20 Vtct., c. 97, § 2; *Chilton v. Carrington*, 15 Com. B. 730; 1 Jur., N. S., 477; 24 L. J. Com. P. 78.

<sup>4</sup> *Waite v. Dolby*, 8 Humph. 406.

<sup>5</sup> *Molloy v. McDaniel*, 1 Over. 222; *Garland v. Bugg*, 5 Munt. 166.

<sup>6</sup> *Morris on Replevin*, 170; 3 Bla. Com. 413; *Tidd's Pr.* 993, 1038. This writ, though but rarely issued, is still proper whenever a return of specific chattels is desired. *State v. Carrick*, 70 Md. 586, 14 Am. St. Rep. 387.

<sup>7</sup> *Morris on Replevin*, 171; *Tidd's Pr.* 1038; *Gibbs v. Bull*, 18 Johns. 435.

session of the same, particularly describing it." The writ also specifies the value of the property, and authorizes, in case a delivery thereof cannot be had, the sheriff to levy the value of such property out of the personal property of the judgment debtor, or if sufficient personal property cannot be found, then out of his real estate.<sup>8</sup> In Nebraska, if a plaintiff, during the progress of an action, has acquired possession of the property sued for, but judgment is rendered against him, it becomes his duty to return such property, and, failing to do so, he has no just cause to complain if the defendant takes out a writ of execution for the value of the property without giving the privilege of returning it.<sup>9</sup>

If the sheriff is unable to find the property, he may proceed to collect its value and the costs of suit, and his proceedings will be governed by the same rules as if he were acting under a writ of fieri facias. But, in his efforts to obtain and deliver possession of the property described in his writ, he ought to make the most complete search; and it has been held that he may, after first demanding admittance, break into the defendant's dwelling, whether the outer doors be fastened or not.<sup>10</sup> The more recent decisions, however, indicate that, in the absence of statutes specially authorizing it, an officer is in no case warranted in breaking into a dwelling for the purpose of serving any civil process, and hence that he may not lawfully do so under an execution in replevin.<sup>11</sup> The rules applicable to the issue, form, and execution of writs for the pos-

<sup>8</sup> Cal. Code Civ. Proc., § 682.

<sup>9</sup> Goodman v. Kennedy, 10 Neb. 270; Elckhoff v. Elkenbary, 52 Neb. 336.

<sup>10</sup> Keith v. Johnson, 1 Dana, 604, 25 Am. Dec. 167.

<sup>11</sup> State v. McPherson, 132 Ind. 371, 32 Am. St. Rep. 257; Kelley v. Schuyler, 20 R. I. 432.

session of personal property are substantially identical with the rules concerning writs for the possession of real estate, of which we are about to treat.

Under an execution in replevin, the plaintiff is entitled to a return of the identical property sued for, and the defendant cannot satisfy the writ by offering other property in place of that for which judgment was recovered, though of the same character and value.<sup>12</sup> If the writ may be regarded as directing the taking of the property specified therein wherever it may be, then an officer is necessarily justified in so taking it, though it may belong to, and be in the possession of, a stranger to the action; and such, beyond question, is the effect of an execution in replevin unless modified by statute.<sup>13</sup> Replevin is intended to recover the possession of chattels only, but chattels may be so situated upon real estate that they may, under some circumstances, be deemed realty, and under others, personal property, and an officer having a writ commanding him to take and deliver possession of a house or other property apparently attached to the real estate cannot be expected to determine whether it is real or personal property. That is a matter for the consideration of the court rendering the judgment and issuing the writ, and the officer should be protected in obeying it, though it subsequently appeared that he had severed an article attached to, and constituting a part of, the realty.<sup>14</sup> There is a tendency in the United States to

<sup>12</sup> *Swantz v. Pillow*, 50 Ark. 300, 7 Am. St. Rep. 98; *Eickhoff v. Eikenbary*, 52 Neb. 336; *Irwin v. Smith*, 68 Wis. 220, 227.

<sup>13</sup> *Watson v. Watson*, 9 Conn. 14; *Boyden v. Frank*, 20 Ill. App. 169; *Phillips v. Spotts*, 14 Neb. 139; *Watkins v. Page*, 2 Wis. 92; *Battis v. Hamlin*, 22 Wis. 669; *Buck v. Colbath*, 3 Wall. 334; *Hallett v. Byrt*, Carth. 380; *Shipman v. Clark*, 4 Den. 446.

<sup>14</sup> *Cobbey on Replevin*, § 650; *Thompson v. State*, 3 Ind. App. 371;

consider the statutes respecting replevin, or actions of claim and delivery of personal property, as having modified the common-law rule to the extent of making the writ in effect a command to take the property therein named from the possession of the defendant, and hence as justifying the officer if the property is taken from such possession, though it may belong to another, but, on the other hand, making him answerable if the property so taken was not in the possession of the defendant, and did not, in fact, belong to him.<sup>15</sup>

The taking of property under a writ of replevin undoubtedly puts it in the custody of the law,<sup>16</sup> and renders any subsequent interference with it, while in the possession of the officer, punishable as a contempt of court.<sup>17</sup> Hence, no officer having in his possession another writ of replevin is justified in taking the property described therein from the custody of an officer who had previously seized it in pursuance of the directions of a like writ.<sup>18</sup> In some parts of the United States, however, statutes have been enacted which permit an action of replevin to be maintained against an officer who has seized goods under a writ of replevin, providing the plaintiff in the second action is not a party to the first.<sup>19</sup> In North Dakota, if an officer taking property under a writ of replevin is served with notice of a claim of ownership thereto by a stranger to

*Elliott v. Bloch*, 45 Mo. 374. Contra, *Roberts v. The Dauphin Deposit Bank*, 19 Pa. St. 573.

<sup>15</sup> *Willard v. Kimball*, 10 Allen, 211, 87 Am. Dec. 632; *Bullis v. Montgomery*, 50 N. Y. 352; *Otis v. Williams*, 70 N. Y. 208; *Welter v. Jacobson*, 7 N. D. 32, 66 Am. St. Rep. 632.

<sup>16</sup> *Welner v. Van Rensselaer*, 43 N. J. L. 547.

<sup>17</sup> *Welter v. Jacobson*, 7 N. D. 32, 66 Am. St. Rep. 632.

<sup>18</sup> *Larson v. Nichols*, 62 Minn. 256, 54 Am. St. Rep. 639; *Welter v. Jacobson*, 7 N. D. 32, 66 Am. St. Rep. 632.

<sup>19</sup> *Davis v. Gambut*, 57 Ia. 239; *Gross v. Bogard*, 18 Kan. 288; *Relley v. Haynes*, 36 Kan. 259, 5 Am. St. Rep. 737.



the action, he may demand indemnity of the plaintiff, and, if it is not given, may surrender such property to the defendant from whom it was taken. Failing to so surrender it, the officer becomes liable to an action of trover, but not to one of replevin.<sup>20</sup>

**§ 469. Executing Judgment for Possession without the Aid of a Writ.**—After the entry of a judgment against him for the possession of real property, the defendant may abandon it. In such an event, there appears to be nothing to prevent the plaintiff from executing the judgment by making an entry upon the land. It is true that one of the judges who decided a comparatively recent English case doubted whether a plaintiff could, in any circumstances, lawfully take possession without first suing out a writ and seeking the aid of the sheriff.<sup>21</sup> Certainly a plaintiff would not be encouraged in obtaining possession forcibly nor surreptitiously. But if, after a judgment in his favor, he takes possession peaceably, by the consent or without the opposition of the defendant, his entry is lawful, and he is thereafter, in all respects, entitled to the benefit of the judgment as fully as though the sheriff had placed him in possession by virtue of a writ.<sup>22</sup> To entitle the plaintiff to the benefit of this rule, the judgment must not be for an indefinite or uncertain tract

<sup>20</sup> *Welter v. Jacobson*, 7 N. D. 32, 66 Am. St. Rep. 632.

<sup>21</sup> *Doe d. Stevens v. Lord*, 6 Dowl. P. C. 256; 7 Ad. & E. 610.

<sup>22</sup> *Taylor d. Atkyns v. Horde*, 1 Burr. 60; *Roscoe on Real Actions*, 608; *Lacy v. Berry*, 2 Sid. 155; *Craft v. Yeane*, 66 Pa. St. 210; *Caldwell v. Walters*, 22 Pa. St. 380; *Jackson v. Combs*, 7 Cow. 36; *Jackson v. Haviland*, 13 Johns. 229; *Hildreth v. Thompson*, 16 Mass. 191; *Withers v. Harris*, 1d. Raym. 808; *Creighton v. Proctor*, 12 Cush. 436; *Davis v. Lee*, 2 B. Mon. 300; *Smith v. Hornback*, 4 Litt. 234, 14 Am. Dec. 122; *Bowman v. Violet*, 4 T. B. Mon. 357; *Tribble v. Frame*, 5 Litt. 187; *Bowar v. Chicago W. D. Ry. Co.*, 136 Ill. 101.

or portion,<sup>23</sup> and the entry must be made during the continuance of the term which he has recovered.<sup>24</sup>

**§ 470. Issuing Writs for Possession of Real Estate.** If, after judgment in a real action, or in an action for the possession of real estate, the defendant continues to withhold possession, the remedy of the plaintiff is, in the first-named action, to sue out a writ of *habere facias seisinam*,<sup>25</sup> and in the second-named action, to sue out a writ of *habere facias possessionem*.<sup>26</sup> He may also have a *feri facias* clause added to the writ, requiring the sheriff to levy the damages and costs for which he has recovered judgment, or he may, in states where he is entitled to such relief, have the defendant taken in execution to satisfy such costs and damages.

The term "writ of possession" is now very generally employed to designate any writ by virtue of which the sheriff or other officer is commanded to place any person in the possession of real or personal property. With respect to the issue of writs of possession, very little need here be said, because the greater portion of the rules stated in the first part of this work is applicable to the issue of these writs. In the action of ejectment, where the judgment is entered against the casual ejector, it seems to be necessary for the plaintiff to apply to the court for leave to issue execution.<sup>27</sup>

<sup>23</sup> *Hildreth v. Thompson*, 16 Mass. 191; *Gwynne on Sheriffs*, 418.

<sup>24</sup> *Smith v. Hornback*, 4 Litt. 234, 14 Am. Dec. 122; *Jackson v. Haviland*, 13 Johns. 229.

<sup>25</sup> *Roscoe on Real Actions*, 341; *Bowar v. Chicago W. D. Ry. Co.*, 136 Ill. 101.

<sup>26</sup> *Roscoe on Real Actions*, 608.

<sup>27</sup> *Doe d. Simmons v. Masters*, 1 Chlt. 233; *Doe d. Roberts v. Gibbs*, 1 Chlt. 47; *Stiles d. Redhead v. Oakes, Barnes*, 182; *Fenn v. Marlott, Barnes*, 185; *Jones v. Edwards, Strange*, 1241; *Adams on Ejectment*, 340.

But if the judgment is against the landlord himself, execution may issue without any order of court.<sup>28</sup>

In ejectment, at common law, the recovery was only for the possession of a certain term, for which it was alleged the premises had been demised. After the expiration of such a term no execution could issue.<sup>29</sup> A writ of possession, where the common law on this subject is still in force, must issue within a year and a day, or else the judgment must be revived by *scire facias*.<sup>30</sup> But if the issue of a *habere facias possessionem* was prevented by an injunction, it might issue on the dissolution of the injunction, although more than a year and a day had elapsed since the entry of the judgment, and probably it could issue, in such circumstances, after the termination of the term for which the recovery was had.<sup>31</sup>

It is doubtful whether a *scire facias* ever became necessary, owing to a change of parties in ejectment, by death or otherwise. The plaintiff was a fictitious person, and therefore could neither die nor transfer his title. The real person in interest was not a party to the record, therefore his death could not affect the suit. Hence it is clear that a *scire facias* could not be re-

<sup>28</sup> *Doe d. Lucy v. Bennett*, 4 Barn. & C. 897; *Adams on Ejectment*, 840.

<sup>29</sup> *Wood v. Coghill*, 7 T. B. Mon. 601; *Jackson v. Haviland*, 13 Johns. 229; *Roscoe on Real Actions*. 608; *Gwynne on Sheriffs*, 418; *Kennedy's Heirs v. Reynolds*, 27 Ala. 364; *Robertson v. Morgan*, 2 Bibb, 148.

<sup>30</sup> *Lowry v. Jenkins*, 3 Bibb, 314; *Withers v. Harris*, *Ld. Raym.* 806; *Doe d. Morgan v. Bluck*, 3 Camp. 447; *Roscoe on Real Actions*, 342; *Cook v. Cook*, 3 Lev. 100; *Foster on Scire Facias*, 23, 215; *Doe d. Stephens v. Lord*, 1 Perry & D. 388; *Proctor v. Johnson*, *Ld. Raym.* 669; *Putland v. Newman*, 6 Maule & S. 179; *Goodtitle d. Murrell v. Badtitle*, 9 Dowl. P. C. 1009; *Doe d. Ramsbottom v. Roe*, 2 Dowl. N. S., 690.

<sup>31</sup> *Noland v. Seekright*, 6 Munf. 185; *contra*, *Smith v. Hornback*, 8 A. K. Marsh. 392.

quired on account of any change in the nominal plaintiffs, nor in those from whom such nominal plaintiffs claimed to have acquired the term for which the action was brought.<sup>32</sup> Where one of several defendants died, it is equally clear that no *scire facias* was, on that account, needed to authorize the subsequent issue of execution.<sup>33</sup> Probably the same rule prevailed on the death or marriage of a sole defendant, though in this case the text-writers concur in stating that the more prudent course is to prosecute a *scire facias*.<sup>34</sup> Where the plaintiff is the real party in interest, his death will necessitate a *scire facias*.<sup>35</sup>

The power to issue writs of possession is not confined to courts of law. When a court of equity rightfully has jurisdiction of a cause, it will proceed to administer complete relief as between the parties before it, instead of partly relieving them and directing them to proceed in some other tribunal for the remainder of the relief to which they are entitled. Therefore, if its decree establishes the right of one of the parties to be in possession of real property, it will issue its writ in his favor, requiring possession to be taken from his adversary and delivered to him.<sup>36</sup>

Alias and pluries writs of possession may be issued when requisite to enforce the satisfaction of the judgment. But it is a generally recognized rule that no

<sup>32</sup> Foster on Scire Facias, 217; Howell v. Eldridge, 21 Wend. 678; Doe d. Beyer v. Roe, 4 Burr. 1970; Anonymous, 3 Salk. 319; Roscoe on Real Actions, 342; Withers v. Harris, Ld. Raym. 806; Foster on Scire Facias, 216.

<sup>33</sup> Doe d. Taggart v. Butcher, 3 Maule & S. 557, and authorities in the preceding citation.

<sup>34</sup> Adams on Ejectment, 346.

<sup>35</sup> Foster on Scire Facias, 216.

<sup>36</sup> Harding v. Fuller, 141 Ill. 308; Oberein v. Wells, 163 Ill. 101; Root v. Wollworth, 150 U. S. 401.

writ, whether alias, pluries, or original, can issue to enforce a judgment which has already been satisfied. But when is a judgment for the possession of real or personal property so satisfied that this rule can be invoked? In a subsequent section<sup>37</sup> we shall show that the return of the writ filed in court, showing its execution, is such a satisfaction that no further writ can issue, although the defendants have expelled the plaintiff and resumed possession; but that, where no such return has been made, an alias or pluries may issue, though a former writ was in fact executed. In Ohio, if the plaintiff takes peaceable possession under his judgment, by the consent or acquiescence of the defendant, even without the aid of a writ, the judgment is satisfied thereby, and no writ of possession can afterward issue.<sup>38</sup>

**§ 471. Form.**—A writ of *habere facias possessionem* should be directed to the sheriff of the county where the lands lie.<sup>39</sup> It should recite the judgment recovered, giving a description of the premises, and stating the term which had been demised to the plaintiff, and for which judgment had been given; and should command the sheriff without delay to cause the plaintiff “to have possession of his term yet to come,” and also to make return in what manner he has executed the writ.<sup>40</sup>

<sup>37</sup> § 477.

<sup>38</sup> *Hinton v. McNeill*, 5 Ohio, 509, 24 Am. Dec. 315; *Hough v. Norton*, 9 Ohio, 45.

<sup>39</sup> Roscoe on Real Actions, 608.

<sup>40</sup> Bingham on Judgments and Executions, 891. For form for writ of possession, see Glauque's Rev. Oh. Stats., 7th ed., § 6611; Laws of Del., 1893, p. 840, § 43; Gen. Stats. Kan., 1897, pp. 482, 483, § 110; Cal. Code Civ. Proc., § 682; 4 Walt's Pr. 114. Formerly, the premises recovered were not described in the writ. Adams on Eject-

The acts of the officer under the writ terminate with putting the plaintiff in possession and removing the defendant and his property therefrom. If he re-enters, redress must be sought by some other writ or proceeding. Hence, the writ cannot command the officer to maintain the defendant in possession. "The courts cannot, in such cases, by the mere issuance of process, maintain the successful litigants in the rights accorded to them. They cannot, in such cases, order the stationing of their sheriffs and bailiffs as guards over premises, to prevent the commission of trespass thereon."<sup>41</sup>

The writ need not specify any return day,<sup>42</sup> but may be made returnable immediately after its execution.<sup>43</sup> The part of a writ of possession likely to require the most care, and to occasion the greatest controversy, is that describing the property of which possession is to be delivered. Upon this subject, the general rule prevails that any description is sufficient which will enable the officer to identify the property.<sup>44</sup> Therefore, the omission to designate the name of the township in which the premises are is not fatal to the writ, if they are otherwise sufficiently identified.<sup>45</sup> A writ of possession, like all other writs of execution, should conform to the judgment in all respects.<sup>46</sup> Hence, if the

ment, 341; Gwynne on Sheriffs, 419. Irregularities in the issue or form of writs of possession do not render them void. *Franklin v. Merida*, 50 Cal. 289.

<sup>41</sup> *Atwood v. State*, 59 Kan. 728. 68 Am. St. Rep. 393.

<sup>42</sup> *Jackson v. Hawley*, 11 Wend. 182.

<sup>43</sup> *Doe d. Hudson v. Roe*, 16 Jur. 725; 21 L. J. Q. B. 859; 18 Q. B. 806.

<sup>44</sup> *Lawrence v. Davidson*, 44 Cal. 177; *Adams v. Frothingham*, 8 Mass. 352; 3 Am. Dec. 151.

<sup>45</sup> *Black v. Black*, 74 Fed. Rep. 978.

<sup>46</sup> *Roscoe on Real Actions*, 609; *Sherman v. Hanno*, 66 N. H. 160.

action is in ejectment, to recover an undivided interest in the premises, and the judgment awards possession thereof, an execution commanding the sheriff to put the plaintiff in possession of the whole of the premises is irregular, and, if executed, the defendants should be restored to the possession.<sup>47</sup>

**§ 472. Compelling and Controlling the Execution of Writs of Possession.**—When the premises recovered are not specifically described in the writ, the plaintiff must, at his peril, point out to the officer the property of which possession is to be delivered.<sup>48</sup> But where the writ contains a sufficient description of the property to enable the officer to identify it, we should judge that he ought to pursue the direction of the writ in preference to the commands of the plaintiff.<sup>49</sup> If the officer refuses to execute the writ, an order compelling him to do so may be obtained by motion in the action in which the writ issued.<sup>50</sup> It has also been held that a mandamus may be procured to compel a clerk to issue or a sheriff to execute this writ.<sup>51</sup> If, however, the officer may be compelled to comply with the command of the writ, by motion and order in the original action, the remedy there is adequate, and the fact that it is so ought, on well-settled principles, to be a sufficient reason for denying an application for a writ of mandate.

<sup>47</sup> *Skinner v. Odenbach*, 81 Hun, 815.

<sup>48</sup> *Johnson v. Nevill*, 65 N. C. 677; *Adams on Ejectment*, §41.

<sup>49</sup> *Jackson v. Rathbone*, 3 Cow. 291.

<sup>50</sup> *Leese v. Clark*, 29 Cal. 664; *Jackson v. Rathbone*, 3 Cow. 291; *Society D'Epargnes v. McHenry*, 49 Cal. 351.

<sup>51</sup> *Fogarty v. Sparks*, 22 Cal. 142; *Fremont v. Crippen*, 10 Cal. 211, 70 Am. Dec. 711; *Moses on Mandamus*, 59; *High on Extraordinary Remedies*, § 133; *People v. Loucks*, 28 Cal. 71; *Chumasero v. Potts*, 2 Mont. 282.

If a reasonable doubt exists whether certain persons may lawfully be dispossessed, the officer may exact a bond of indemnity before proceeding to dispossess them.<sup>52</sup> On the giving of such bond, he has no discretion but to proceed, unless some order is made by the court staying the execution of the writ. If it is claimed that parties ought not to be dispossessed because they entered pending the action, but under a title adverse to that of the parties to the suit, "the determination of the question whether parties thus entering into possession have such antedating title is not left to the judgment of the marshal. He is not clothed with any judicial power to pass upon the rights of parties found upon the premises other than the defendant. The most that he can do, when such a party claims to have a title anterior to the suit, is to require from the plaintiff a bond of indemnity, or give a reasonable time for the party to apply to the court for a modification of the writ, so as to exclude him from its operation. Upon such application the court may stay the enforcement of the writ, or except the applicant from its operation, until the rights of the parties can be properly determined. But when a sufficient bond of indemnity is tendered, and no different order is made in the manner indicated, the duty of the marshal will only be discharged by placing the plaintiff in possession as directed, and this implies a removal of all occupants."<sup>53</sup>

May an officer take a bond from the person in possession for indemnity for his failure to dispossess him?

<sup>52</sup> Long v. Neville, 36 Cal. 455, 95 Am. Dec. 199; Dupont v. Ervin 2 Brev. 400; Crocker on Sheriffs, § 572; Adams on Ejectment, 342; Huerstal v. Muir, 64 Cal. 452; Grace v. Mitchell, 31 Wis. 533, 11 Am. Rep. 613.

<sup>53</sup> Hall v. Dexter, 3 Saw. 434.



If such person is one of the defendants named in the writ, or if, from any cause, it is clear that he ought to be dispossessed, the officer can no more enforce a bond agreeing to indemnify him for not obeying the writ than he could enforce indemnity for his failure to perform any other clear official duty. But the person in possession may not be a party to the suit, and there may be well-founded doubts of the right of the officer to dispossess him, and he may feel so confident of his right to remain in possession that he is quite willing to agree to indemnify the officer for not disturbing him. If so, is there any principle of public policy forbidding the acceptance of a bond of indemnity, and the recovery thereon, if accepted, to the officer's detriment? In Missouri, this question has been answered in the affirmative. "No such indemnity," said the court, "is provided for where the writ affects the possession of real estate, and if this be a legislative omission, the courts cannot supply it by judicial construction."<sup>54</sup>

The court whence the writ issued has, and will exercise, a general and equitable control over its execution, and will correct any errors which the officer has made.<sup>55</sup> It has been held that the court will not, in advance, direct the officer how he shall execute his writ.<sup>56</sup> We regard this decision as unsound. It is in conflict with the undoubted rule that the court has general control over its process, with the authority to require such process to be properly enforced. It also

<sup>54</sup> *Harrington v. Crawford*, 61 Mo. App. 221, 136 Mo. 467, 58 Am. St. Rep. 653.

<sup>55</sup> *Oetgen v. Ross*, 47 Ill. 142, 95 Am. Dec. 468; *Coleman v. Henderson*, 2 Scam. 251; *Mathers v. Akewright*, 2 Binn. 93; see the cases cited in § 476; *Bowar v. Chicago W. D. Ry. Co.*, 136 Ill. 100.

<sup>56</sup> *Bowie v. Brahe*, 4 Duer, 676.

conflicts with other decisions bearing upon the same subject.<sup>57</sup>

§ 473. The Powers and Authority of an Officer in Executing a Writ of Possession are ample for the accomplishment of everything requisite to a lawful enforcement of the writ. He may summon all the power of the county to his aid. He may remove all persons whose rights are subject to the writ, together with their property found on the premises, and may exercise all the force required to overcome such opposition as may be made to such removal. Those who undertake to resist or disturb him may be proceeded against by attachment in the suit whence the writ issued.<sup>58</sup> If a dwelling or other house is on the premises, he may, after first making a fruitless demand for admittance, break the doors and windows, and use all requisite force to gain admission, and to remove all the occupants whom he is entitled to dispossess under his writ.<sup>59</sup> Whether the power of the officer continues after the return day named in the writ is a question which has arisen so infrequently that it is, perhaps, yet unsettled. The earlier decisions and dicta indicate that, in this respect, there is no difference between this and other writs of execution, which, as has been already shown,<sup>60</sup> become, for most purposes, *functus*

<sup>57</sup> *Jackson v. Rathbone*, 3 Cow. 291; *Leese v. Clark*, 29 Cal. 664; *Adams on Ejectment*, 342; *Doe d. Forster v. Wandlass*, 7 Term Rep. 118; *Roe v. Street*, 2 Ad. & E. 329.

<sup>58</sup> *Kingsdale v. Mann*, 1 Salk. 321; 6 Mod. 27; *Roscoe on Real Actions*, 610; *Crocker on Sheriffs*, § 574; *Adams on Ejectment*, 343; *Gwynne on Sheriffs*, 419.

<sup>59</sup> *Roscoe on Real Actions*, 609; *Crocker on Sheriffs*, § 573; *Keith v. Johnson*, 1 Dana, 605, 25 Am. Dec. 167; *Howe v. Butterfield*, 4 Cush. 302, 50 Am. Dec. 785; *Adams on Ejectment*, 342; *Semayne's Case*, 5 Coke, 91 b.

<sup>60</sup> *Ante*, § 106.

officio after their return day.<sup>61</sup> But the latest and best-considered decision on the subject indicates that such writs remain in force irrespective of the lapse of time, until their actual execution. In this decision the court said: "The judgment bound the land of which the writ directed possession to be delivered, and the office of the writ was simply to carry the judgment into effect with reference to that particular piece of land. Formerly such writs had no return day. The plaintiff had the right to take possession of the land by virtue of the judgment, if he could peaceably do so. We think, in such a case, the command to return the writ in sixty days is directory merely. Such an execution is not analogous to an execution against personal property, where a levy is necessary to subject it to the operation of the writ, but is more analogous to a proceeding to sell real estate under execution, which may be had without any previous levy, and which counsel concedes in his brief may be taken after the return day of the writ."<sup>62</sup>

§ 474. **How to be Executed.**—A writ of possession is executed by placing the plaintiff in the actual and peaceable possession of the lands and tenements recovered.<sup>63</sup> The delivery of possession to the plaintiff's agent is equivalent to the delivery to the plaintiff in person.<sup>64</sup> If the plaintiff is a cotenant with the defendants, he should be placed in possession along with them.<sup>65</sup> Otherwise they and their property should be

<sup>61</sup> United States v. Slaymaker, 4 Wash. C. C. 169.

<sup>62</sup> Witbeck v. Van Rensselaer, 64 N. Y. 27.

<sup>63</sup> Bingham on Judgments and Executions, 252.

<sup>64</sup> Higginbotham v. Higginbotham, 10 B. Mon. 370; Kercheval v. Ambler, 4 Dana, 166, 23 Am. Dec. 446; Smith v. White, 5 Dana, 376.

<sup>65</sup> Dupont v. Ervin, 2 Brev. 400; Ash v. McGill, 6 Whart. 391; Ewald v. Corbett, 32 Cal. 499; Tevis v. Hicks, 38 Cal. 234; Freeman on Cotenancy and Partition, § 293.

removed from the premises, and the plaintiff put in the exclusive and peaceable possession thereof.<sup>66</sup> Under a writ of possession with a fieri facias clause therein, a sheriff went to the premises designated in the writ and formally delivered them to the plaintiff's agents, and levied upon and removed so much of the personal property thereon as was thought to be of sufficient value to satisfy the writ, but before the balance of the property was removed, the defendant perfected an appeal and obtained an order staying all further proceedings. Under these circumstances, it was claimed that, before the making of this order, the writ had been fully executed, and hence that the stay did not affect it nor the possession delivered under it. The court, however, determined that the writ had not been executed, saying: "In order to constitute a full execution of the writ, the defendant and its property must have been removed from the premises, and the possession of the real estate given to the plaintiff, unless the removal of the personal property was in some way waived by the defendant."<sup>67</sup>

<sup>66</sup> Scott v. Richardson, 2 B. Mon. 510, 38 Am. Dec. 170; Farnsworth v. Fowler, 1 Swan. 1, 55 Am. Dec. 718.

<sup>67</sup> Lee Chuck v. Wo Chong Co., 81 Cal. 222, 15 Am. St. Rep. 50. In the case of Upton v. Wells, 1 Leon. 145, the sheriff returned upon the writ that, in the execution thereof, he took the plaintiff with him, and came to the house recovered and removed thereout a woman and two children, which were all the persons which, upon diligent search, he could find in the house, and delivered to the plaintiff peaceable possession to his thinking, and afterward departed, and immediately after, three other persons, who were secretly lodged in the house, expelled the plaintiff again, upon notice of which he returned to the house to put the plaintiff in full possession; but the other did resist him, so as without peril of his life and of them that were with him he could not do it. This was held to be no execution of the writ, and the court awarded a new writ and an attachment against the parties. In the case of Gresham v.

But neither the removal of the defendants nor of their property is indispensable in all cases, for the possession of the plaintiff may be made peaceable and

Thum, 3 Met. 287, 77 Am. Dec. 174. Stites, J., who delivered the opinion of the court, said: "But to satisfy the judgment there must be a thorough and complete execution of the writ. The delivery of possession thereunder must be effectual, and not merely formal. To turn out the defendant, and put in the plaintiff, under circumstances which indicate beyond reasonable doubt that the latter cannot remain in possession, even for a day, without imminent peril of great personal injury, or, perhaps, loss of life, but must, to avoid such hazard, immediately abandon the possession, and give way to the defendant, who stands ready to re-enter, and, in point of fact, does re-enter on the same day, is not, in our opinion, a complete and effectual execution of a writ. The delivery of possession under such circumstances is merely formal. It is, in fact, no satisfaction of the judgment, no execution of the writ." In *Farnsworth v. Fowler*, 1 Swan, 1, 55 Am. Dec. 718, it appeared that, in a former suit, Farnsworth had obtained judgment against Fowler, awarding to the former a writ of possession for a house and a farm. Subsequently Fowler filed his bill in chancery, and obtained an injunction enjoining Farnsworth from taking possession of said premises in any manner, or causing a writ of possession on his said judgment to issue for the same. Two days after Farnsworth caused the writ of possession to issue, and placed it in the hands of an officer to be executed, who, upon the same day, went upon the premises with Farnsworth and others, and was proceeding to execute the writ, when the sheriff arrived with the injunction and served it on the parties. The officer had removed Fowler's family and effects from the dwelling-house into the yard, and was about to remove them off the premises, when any further action was arrested by the service of the injunction. He stated that he had placed Farnsworth in possession of the house, and Fowler's wife and children and his effects were remaining in the yard when the injunction was served, and that nothing further was done in the execution of the writ of possession. Fowler then endeavored to resume the possession of the house, when he was violently and forcibly resisted, beaten, and driven away by Farnsworth and others who were present acting with him. He then went with his family to a barn on the premises, where he remained about three months, Farnsworth retaining possession of the house. This was held not to be an execution of the writ of possession. Totten, J., who delivered the opinion of the court, said: "Was the writ of possession executed before the service of the injunction? Now, as to what is a legal and valid execution of a writ of *habere facias possessionem*, we may observe that

perfect without the removal of either. This happens when the defendants, ceasing to hold in hostility to the plaintiff, acquiesce in his title, and agree to hold possession in subordination to it.<sup>69</sup> In no case is the execution of the writ complete until the officer quits the premises, leaving the plaintiff in quiet possession thereof, with all persons holding in hostility to him removed therefrom.<sup>70</sup> The plaintiff is also entitled to be placed in the possession of all fixtures and improvements<sup>70</sup> attached to the premises, and to all crops growing or standing thereon.<sup>71</sup> The possession delivered under the writ will be construed to include lands

It is the duty of the officer to deliver the full and actual possession of the premises recovered. And it is said that the process is not understood to be executed, nor the execution complete, until the officer is gone, and the plaintiff left in quiet possession. If the tenant do not quietly and peaceably yield the possession to the plaintiff and consent thereto, it is the duty of the officer to remove him entirely off the premises, and it cannot be said that he has executed the writ until he has done so. In fact, it is the surest and best way so to remove the tenant that the plaintiff may have the exclusive and quiet possession to which he is entitled by virtue of his recovery. Now, in the present case, the possession was not yielded, but was contested and resisted, and yet the tenants remained on the premises, when the action of the officer was arrested by service of the injunction. Nor had the officer given possession of the entire premises recovered, but only of the house which was a part thereof. In this respect, therefore, the writ was only in part executed. And when he had gone he left the tenants and the plaintiff on the premises contesting the right of possession, and, neither party yielding, it resulted in strife and violence, which it is an important object of the writ to prevent or suppress. We are of opinion, therefore, that the writ of possession was not executed before the service of the injunction, or, in other words, that in a legal and proper sense it was not executed at all."

<sup>69</sup> *Smith v. White*, 5 Dana, 376; *Witbeck v. Van Rensselaer*, 64 N. Y. 27.

<sup>70</sup> *Farnsworth v. Fowler*, 1 Swan, 1, 55 Am. Dec. 718; *Adams on Ejectment*, 343.

<sup>71</sup> *McMinn v. Mayes*, 4 Cal. 209; *Russell v. Blake*, 2 Pick. 507.

<sup>72</sup> *Hodgson v. Gascoigne*, 5 Barn. & Ald. 88; *McLean v. Bovee*, 24 Wis. 295, 1 Am. Rep. 185; *Doe d. Upton v. Witherwick*, 3 Bing. 11;

covered by water, though the officer does no special act with reference thereto. It is not necessary, to make the delivery effective, that he should remove such water by breaking a dam by which it is held in place, or otherwise draining it off the land.<sup>72</sup>

There are many instances in which the property is of peculiar character and situation, so that it is not possible to make any other than a constructive delivery of it, except by its substantial destruction. Where such is the case, a constructive delivery must be held sufficient. Thus, under a writ for the possession of a wall, built of wood, plastering, and other materials, dividing two stores, the sheriff went with the plaintiff to one of the storehouses, and, after telling the persons there present that he had come to put the plaintiff in possession, the officer pointed out the wall to him, and said: "There is your wall. I put you in possession of it." The officer then went with the plaintiff to the other side of the wall, and in the same way put him in possession of it. Afterward, the plaintiff began the removal of the wall, but the defendants in the writ interposed by force and prevented further removal. The plaintiff then moved to quash the return on the writ showing that it had been executed, but the court held that such return was correct; that the officer had done all he was required to do; that it was not his duty to pull down the wall; and the remedy of the plaintiff

<sup>1</sup> 10 Moore, 267; Rowell v. Kline, 6 Chic. L. N. 231; Altes v. Hinckler, 36 Ill. 275, 85 Am. Dec. 407; King v. Fowler, 14 Pick. 238; Lane v. King, 8 Wend. 584, 24 Am. Dec. 105; Morgan v. Varich, 8 Wend. 587; Shepard v. Philbrick, 2 Denio, 174; Gillett v. Balcom, 6 Barb. 370; Adams on Ejectment. 347. But the plaintiff is not entitled to crops grown and harvested before judgment, by a person holding the premises in good faith under a claim of title. Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462.

<sup>72</sup> Perrine v. Bergen, 2 Green, 355.

must be sought against the defendants for wrongfully preventing the removal.<sup>73</sup>

**§ 475. Who may be Dispossessed.**—The defendant and all the members of his family, together with his servants, employés, and his tenants at will or sufferance, may be removed from the premises in executing a writ of possession.<sup>74</sup> This may sometimes result in the removal from the premises of members of the defendant's family who have the right to remain there. Thus, real property was claimed adversely to the owners thereof. Those in whom four-fifths of the title was vested recovered judgment against the adverse claimant for the possession thereof, and a writ issued commanding the sheriff to put the plaintiffs in possession of four-fifths of the estate. The owner of the other one-fifth was the defendant's minor son, four years of age, living with his father on the premises. The sheriff, because of this son's undivided interest, refused to dispossess the defendant, claiming that, by reason of the tender years of the child, he had a right to have his father remain with him on the premises. The court held that the possession of the father could not be regarded as the possession of the child, because the former had held in hostility to the title of the latter; that the child, being a minor, could not claim possession for himself; and the father had no legal right to hold possession for the child unless first appointed its guardian; and, finally, that it was the duty of the officer to oust the defendant from the premises, leaving the right of the minor to be protected in a proper pro-

<sup>73</sup> *Loeb v. Waller*, 110 Ala. 487.

<sup>74</sup> *Mattox v. Helm*, 5 Litt. 186, 15 Am. Dec. 64; *Higginbotham v. Higginbotham*, 10 B. Mon. 372.



ceeding if disturbed by the other tenants in common.<sup>75</sup> It has even been held that the defendant's wife must be removed, although she was not a party to the suit, and claimed the premises as her separate estate.<sup>76</sup> Notwithstanding this decision, we are confident that neither a wife nor any other member of the defendant's family not a party to the suit, can lawfully be dispossessed of his or her separate estate, unless possession was acquired by them from the defendant after the institution of the action.<sup>77</sup> A wife, though not seised of any separate estate in real property, may have a right to remain in possession thereof, and this right may be one of which her husband has no power to deprive her. If so, a judgment against him cannot be binding against her, nor authorize her removal from the property. This happens when real property is occupied by a husband and wife as their homestead, in which event a writ of possession against him alone does not justify an officer in dispossessing her, if her homestead rights antedated the commencement of the suit.<sup>78</sup>

In *Saunders v. Webber*, 39 Cal. 287, a wife sought to enjoin the execution of a judgment rendered against her husband in an action of forcible entry and detainer, on the ground that the premises were her separate property, and that the entry was made by her as owner, and that she was not a party to the action in which the judgment had been entered. The injunction was denied on the ground that the forcible entry, whether made by the husband alone or in conjunction

<sup>75</sup> *State v. Staed*, 143 Mo. 248.

<sup>76</sup> *Johnson v. Fullerton*, 44 Pa. St. 466.

<sup>77</sup> *Tevie v. Hicks*, 38 Cal. 241; *Bushong v. Rector*, 32 W. Va. 311, 25 Am. St. Rep. 817.

<sup>78</sup> *Haviland v. Chase*, 116 Mich. 214.

with his wife, was his trespass, and that a judgment against him was therefore sufficient authority for the dispossession of any member of his family. There is greater danger of collusion between members of the same family than between other persons, and therefore when any member of the defendant's family sets up an adverse claim, and undertakes to resist the service of a writ of possession, there must always be a very close scrutiny of the claim to avoid the results of a probable collusion. But if no collusion is apparent, the right of the defendant's wife to remain in possession, if she holds a paramount adverse title, is as strong as if she were not united to him by marriage. An unfounded or invalid claim of title made by her will not entitle her to remain in possession.<sup>79</sup> She, like every one else found in possession, is presumed to have entered under the defendant. In fact, this presumption extends further in her case than in theirs, for if their possession existed anterior to the commencement of the action, probably this presumption would not be indulged. But if she is in possession at the commencement of the action as the wife of the defendant, the presumption is, in the absence of proof of a separate property in her, that she was in possession under her husband; and being in under him, she must go out with him.<sup>80</sup> The fact that she has commenced an action for divorce against her husband is immaterial, in the absence of evidence that the premises are her separate estate.<sup>81</sup>

No person in possession of the premises, claiming title thereto at the commencement of the action, can be dispossessed unless he was made a party to the suit

<sup>79</sup> *Fiske v. Chamberlin*, 103 Mass. 495.

<sup>80</sup> *Huerstal v. Muir*, 64 Cal. 450.

<sup>81</sup> *Gray v. Nunan*, 63 Cal. 220.

so as to be bound by the judgment;<sup>82</sup> nor can the tenants or agents of such person be lawfully removed, although their entry was subsequent to the institution of the action. On the other hand, all persons acquiring possession from and under the defendant or defendants, during the pendency of the action, whether as vendees, lessees, or otherwise, are bound by the judgment, and should be removed under the writ.<sup>83</sup> Persons acquiring possession from the defendant prior to the suit cannot be dispossessed unless they were made parties defendant. All persons entering upon the possession of the property pendente lite are presumed to have entered under the defendant; and prima facie, are liable to be turned out by the writ.<sup>84</sup>

It is obvious that the temptation to render the plaintiff's action fruitless by turning over the possession to one not a party to the suit is very great. All courts will exercise great caution in considering the right of

<sup>82</sup> Howard v. Kennedy, 4 Ala. 592, 39 Am. Dec. 307; Clark v. Parkinson, 10 Allen, 133, 87 Am. Dec. 628; Ford v. Doyle, 37 Cal. 346; Rogers v. Parish, 35 Cal. 127; Tevis v. Ellis, 25 Cal. 515; South B. L. A. v. Christy, 41 Cal. 501; Garrison v. Savignac, 25 Mo. 47, 69 Am. Dec. 448; Goerges v. Hufschmidt, 44 Mo. 179; Powell v. Lawson, 49 Ga. 290; Calderwood v. Peyser, 31 Cal. 333; Hyde v. Boyle, 93 Cal. 1; Moulton v. McDermott, 93 Cal. 663; Atwood v. State, 59 Kan. 728, 68 Am. St. Rep. 393; Davidson v. Weed, 48 N. Y. Supp. 368; Marcom v. Wyatt, 117 N. C. 129; Krepps v. Mitchell, 156 Pa. St. 320.

<sup>83</sup> Freeman on Judgments, § 171; Satterlee v. Bliss, 36 Cal. 489; Wattson v. Dowling, 26 Cal. 124; Long v. Morton, 2 A. K. Marsh. 89; Sampson v. Ohleyer, 22 Cal. 200; Hanson v. Armstrong, 21 Ill. 442; Jackson v. Tuttle, 9 Cow. 233; Hickman v. Dale, 7 Yerg. 149; Jones v. Chiles, 2 Dana, 25; Wallen v. Huff, 3 Sneed, 82, 65 Am. Dec. 49; Mayne v. Jones, 34 Cal. 483; Howard v. Kennedy, 4 Ala. 592, 39 Am. Dec. 307; Ritchie v. Johnson, 50 Ark. 554, 7 Am. St. Rep. 120.

<sup>84</sup> Leese v. Clark, 29 Cal. 664; Wetherbee v. Dunn, 36 Cal. 147, 95 Am. Dec. 166; Hall v. Dexter, 3 Saw. 434; Huerstal v. Muir, 64 Cal. 450; McCreery v. Everding, 54 Cal. 166; Mayne v. Jones, 34 Cal. 483; State v. Harrington, 41 Mo. App. 446.

a person to retain possession after the judgment, when it is clear that he entered *pendente lite*. His right will always be denied, unless it is clear that he did not enter under the defendant, nor by any collusion with him. Mere tricks and devices to rob the plaintiff of the result of his litigation will not be encouraged. But if it clearly appears that any person has entered subsequently to the institution of the suit, not under the defendant, but in his own right, claiming adversely to the defendant, then the officer cannot lawfully dispossess such person.<sup>85</sup> The case of an occupant of the public lands is peculiar, and may call for the application of rules which cannot be conceded in other cases. To dispossess him after he had become entitled by virtue of a patent from the government would, to some extent, interfere with the disposition of such lands, and indirectly entitle persons thereto, or to the possession thereof, who are not competent to acquire any title or right of possession as pre-emptioners or homestead claimants. In other cases, if a defendant were entitled to purchase an outstanding adverse claim, and thereupon to insist that he could not be dispossessed until the validity of that claim had been determined in another action, a succession of such purchases would probably follow the entry of every judgment, and keep the plaintiff for an indefinite time out of the possession of his property. The tendency of the decisions, therefore, is to require the writ to be executed, though the tenant has, since the commencement of the action, purchased an adverse claim to the property, and to leave him to assert such claim by an action to recover

<sup>85</sup> *Mayo v. Sprout*, 45 Cal. 99; *Smith v. Pretty*, 22 Wis. 665; *Irving v. Cunningham*, 77 Cal. 54, 11 Am. St. Rep. 235, and authorities in the preceding citation.

possession after it had been delivered to the plaintiff.<sup>86</sup>

There may probably be instances in which the defendant cannot be ejected, because he has acquired the right of possession since the entry of the judgment, as where, as a pre-emptor, he has acquired the title of the government, and by virtue thereof has become the owner and entitled to the possession of the property.<sup>87</sup>

**§ 476. Restitution after Wrongful Dispossession.**—The sheriff, in executing a writ of possession, may turn out persons against whom his writ did not authorize him to act, or he may deliver possession of lands not embraced in the writ. In either of these events, the person injured may apply to the court issuing the writ, and procure an order directing restitution to him of whatever has improperly been taken from him by the officer.<sup>88</sup> Hence, if a judgment is entered against defendants as individuals for the possession of property which they are entitled to retain as trustees, and they are dispossessed thereunder, they are entitled, in their capacity as trustees, to an order requiring possession to be restored to them.<sup>89</sup> Restitution will also be or-

<sup>86</sup> *Ritchie v. Johnson*, 50 Ark. 551, 7 Am. St. Rep. 118; *Landregan v. Peppin*, 94 Cal. 465; *Kercheval v. Ambler*, 4 Dana, 170.

<sup>87</sup> *Montgomery v. Whiting*, 40 Cal. 294.

<sup>88</sup> *Fowler v. Currie*, 2 Dana, 52, 26 Am. Dec. 436; *Hickman v. Dale*, 7 Yerg. 149; *Breading v. Taylor*, 6 Dana, 226; *Lively v. Ball*, 8 Dana, 312; *City of Natchez v. Vandervelde*, 31 Miss. 706, 66 Am. Dec. 581; *Jackson v. Hasbrouck*, 5 Johns. 366; *Smith v. Pretty*, 22 Wils. 655; *South B. L. A. v. Christy*, 41 Cal. 501; *Mayo v. Sprout*, 45 Cal. 99; *Shaw v. Bayard*, 4 Pa. St. 257; *Roscoe on Real Actions*, 610; *Roe v. Dawson*, 3 Wils. 49; *Cottingham v. King*, 1 Burr. 629; *Jackson v. Stiles*, 5 Cow. 418; *Camden v. Haskill*, 3 Rand. 465; *Blair v. Pathkiller*, 5 Yerg. 230; *Den v. O'Hanlin*, 18 N. J. L. 127; *Skinner v. Odenbach*, 81 Hun, 315.

<sup>89</sup> *Sonnenberg v. Steinbach*, 9 S. D. 518, 62 Am. St. Rep. 885.

dered after the judgment has been vacated or reversed,<sup>90</sup> or after the writ or judgment has been vacated for fraud or irregularity.<sup>91</sup> In Kentucky, restitution was ordered in a case where no writ of possession had ever issued, the defendant having been induced by fraud and deceit to surrender lands to which the plaintiff was not entitled under the judgment.<sup>92</sup> In replacing in possession persons whom the officer has removed under the writ, the rule of the courts is to proceed with great caution, and not to grant the relief sought unless the right to it appears substantially unquestionable. This rule is applicable whether the party applying for restitution claims that he was not a party whom the plaintiff was entitled to dispossess,<sup>93</sup> or that the lands of which he was dispossessed were not embraced within the boundaries of the tract described in the writ.<sup>94</sup>

**§ 477. Proceedings where Defendants Retake Possession.**—After the plaintiff has been placed in the quiet and exclusive possession of his property, and the officer has left the premises, the defendants may return, and, forcibly or otherwise, retake possession and oust the plaintiff therefrom. The law designating the remedies to which the plaintiff may successfully resort in

<sup>90</sup> *Campan v. Coates*, 17 Mich. 235; *Polack v. Shafer*, 46 Cal. 270; *Smith v. Robinson*, 1 T. B. Mon. 14; *Breading v. Blocher*, 29 Pa. St. 347; *Frey v. Helleman*, 54 N. J. L. 284; *Haebler v. Myers*, 132 N. Y. 363, 28 Am. St. Rep. 589.

<sup>91</sup> *Whittington v. Hards*, 15 Jur. 771; 20 L. J. Q. B. 406; *Lowry v. Jenkins*, 3 Blbb, 314; *Dawley v. Brown*, 43 How. Pr. 17; *Den v. —*, 2 Halst. 161.

<sup>92</sup> *Lively v. Ball*, 8 Dana, 312. See *Frank v. Hickman*, 7 J. J. Marsh. 635.

<sup>93</sup> *Cal. Q. M. Co. v. Redington*, 50 Cal. 160.

<sup>94</sup> *Crockett v. Lashbrook*, 5 T. B. Mon. 543, 17 Am. Dec. 98.

such cases is, perhaps, not yet clearly and conclusively settled. Of course, he may prosecute a new action of ejectment; and he may, in most states, maintain an action for forcible entry or unlawful detainer. These remedies are hardly so summary as the circumstances of the case seem to justify, and hence relief is usually sought in the form of an application for an alias writ of possession. But here the applicant is sure to be met by the objection that, by the delivery of the possession under the former writ, the object of the suit was consummated and the judgment fully satisfied; that, being so satisfied, it is *functus officio*, and can therefore support no further writ. If the officer has made a return upon the writ, showing its due execution, and thus establishing by the record the existence of its satisfaction, the objection will prevail, and the plaintiff will be compelled to resort to another action.<sup>95</sup> If, on the other hand, no return has been made, it seems that an alias may issue, notwithstanding the actual execution of the former writ.<sup>96</sup>

In New York, an order restoring parties to the possession of premises was made without the issuing of any alias writ of possession, and under very peculiar

<sup>95</sup> *Weatherhead v. Cunningham*, 4 Dana, 78; *Fowler v. Currie*, 2 Dana, 52, 26 Am. Dec. 436; *Upton v. Wells*, 1 Leon. 145; *Mayo v. Chiles*, 3 T. B. Mon. 258; *Gresham v. Thum*, 3 Met. (Ky.) 287, 77 Am. Dec. 174; *Dent v. Simmons*, 7 J. J. Marsh. 42; *Roscoe on Real Actions*, 842; *Wilson v. Chanton*, 6 L. T., N. S., 255; *Hinton v. McNeill*, 5 Ohio, 509, 24 Am. Dec. 315; *Hough v. Norton*, 9 Ohio, 45. But in Kentucky, an alias was issued upon proof that the execution of the former writ was imperfect. *Gresham v. Thum*, 3 Met. (Ky.) 287, 77 Am. Dec. 174.

<sup>96</sup> *Jackson v. Stiles*, 9 Johns. 391; *Griffeth v. Dobson*, 3 Penr. & W. 228; *Jackson v. Hawley*, 11 Wend. 182; *Roscoe on Real Actions*, 610; *Van Rensselaer v. Witbeck*, 2 Lans. 498; *Doe d. Lloyd v. Roe*, 2 Dowl., N. S., 407; 7 Jur. 352. Contra, *Doe d. Pate v. Roe*, 1 Taunt. 55.

circumstances. After judgment in an action had been entered, and a writ issued thereon under which plaintiff was placed in possession, the defendant procured an order of court directing the amendment of the judgment, and thereupon resumed possession of the premises, and excluded the plaintiff therefrom by force. He applied to the court for, and obtained, an order that the defendant forthwith restore such possession, "and further desist from any forcible or other physical resistance or interference with the enforcement of the execution of the orders of the court or the plaintiff's possession." This order was assailed as one beyond the jurisdiction of the court. It was, however, sustained, the appellate court saying, that the parties to the action were still subject to the jurisdiction of the court, and that the conduct of the defendant was such as to justify the court in using all the power it had to uphold its dignity and authority, that "if the defendant in an action of ejectment may, after the plaintiff has been put in possession, return and resume the possession by force after a short interval of time, in defiance of the judgment, and the plaintiff has no remedy except a resort to some new and independent action or proceeding, then there is at once revealed an obvious defect in our methods of administering justice in such cases. The power of the court to prevent and punish resistance to the execution of its judgments and decrees is not exhausted until the purpose for which the judgment was rendered has been completely attained. It is true that a judgment for the recovery of the possession of real property is to be enforced under the code by execution, but the question as to the power of the court to interpose to aid that process while resistance is made or threatened to the duty im-



posed upon the sheriff, is not necessarily excluded." The court finally, however, rested its action upon the ground that the defendant had taken advantage of the court by procuring the order amending the judgment and execution with the object of accomplishing a purpose which, had it been disclosed before the amendment was made, might have caused the court to refuse to make it, and that the order in question might be regarded merely as a modification, or setting aside, of the order theretofore granted by the court permitting an amendment of the entry of its judgment.<sup>97</sup>

In California, every person dispossessed of real property under process of any court of competent jurisdiction, and who, not having a right to do so, re-enters, or induces, aids, or abets any person without right to take possession of such property, is guilty of a contempt of the court whence the process issued. Upon a conviction for such contempt, an alias writ may issue, requiring the restoration of the possession to the person entitled thereto.<sup>98</sup>

<sup>97</sup> *De Lancey v. Plepgras*, 141 N. Y. 88.

<sup>98</sup> *Code Civ. Proc. Cal.*, § 1210; *Batchelder v. Moore*, 42 Cal. 412; *People v. Dwinelle*, 29 Cal. 632; *Huerstal v. Muir*, 62 Cal. 479.

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